

4-30-2014

## State v. Tomlinson Clerk's Record Dckt. 41913

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,

Plaintiff-Respondent,

vs.

WADE ALLEN TOMLINSON,

Defendant-Appellant.

Supreme Court Case No. 41913

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Fourth Judicial District, in and for the County of Ada.

HONORABLE MICHAEL MCLAUGHLIN

DAVID J. SMETHERS

ATTORNEY FOR APPELLANT

BOISE, IDAHO

LAWRENCE G. WASDEN

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

State of Idaho vs. Wade Allen Tomlinson

Date	Code	User		Judge
9/27/2012	NCRM	TCMCCOSL	New Case Filed - Misdemeanor [Citation issued 09/26/2012]	Magistrate Court Clerk
	PROS	TCMCCOSL	Prosecutor assigned Boise City Prosecutor- Generic	Magistrate Court Clerk
	PCFO	TCMCCOSL	Charge Filed - Cause Found	Magistrate Court Clerk
	BNDC	TCPAANMR	Bond Posted - Cash (Receipt 111524 Dated 9/27/2012 for 500.00)	Magistrate Court Clerk
10/1/2012	APNG	TCTONGES	Appear & Plead Not Guilty/ Defranco	Magistrate Court Clerk
	RQDD	TCTONGES	Defendant's Request for Discovery	Magistrate Court Clerk
	PLEA	TCTONGES	A Plea is entered for charge: - NG (I18-8004 {M} Driving Under the Influence)	Magistrate Court Clerk
10/2/2012	CHGA	TCTURNJM	Judge Change: Administrative	John Hawley Jr.
	HRSC	TCTURNJM	Hearing Scheduled (BC Pretrial Conference 11/19/2012 09:45 AM)	John Hawley Jr.
	HRSC	TCTURNJM	Hearing Scheduled (Jury Trial 12/13/2012 08:15 AM)	John Hawley Jr.
	NOTH	TCTURNJM	Notice Of Hearing	John Hawley Jr.
10/4/2012	RSDS	TCTONGES	State/City Response to Discovery	John Hawley Jr.
	RQDS	TCTONGES	State/City Request for Discovery	John Hawley Jr.
10/19/2012	SUBC	TCCHRIKE	Substitution Of Counsel / Smethers	John Hawley Jr.
	RQDD	TCCHRIKE	Defendant's Request for Discovery	John Hawley Jr.
11/19/2012	TSMH	TCFINNDE	Trial Status Memo	John Hawley Jr.
	HRHD	TCFINNDE	Hearing result for BC Pretrial Conference scheduled on 11/19/2012 09:45 AM: Hearing Held- Leave on Jury Trial	John Hawley Jr.
12/7/2012	RSDS	TCCHRIKE	State/City Response to Discovery / Supplemental	John Hawley Jr.
	RSDS	TCCHRIKE	State/City Response to Discovery / Supplemental	John Hawley Jr.
12/13/2012	CONT	TCFINNDE	Continued (Jury Trial 02/12/2013 08:15 AM)	John Hawley Jr.
	NOTH	TCFINNDE	Notice Of Hearing	John Hawley Jr.
	PTMM	TCFINNDE	Pretrial Memorandum	John Hawley Jr.
1/7/2013	MOTN	TCCHRIKE	Motion to Vacate and Reset Jury Trial	John Hawley Jr.
1/11/2013	ORDR	TCFINNDE	Order Vacating & Resetting Jury Trial	John Hawley Jr.
	CONT	TCFINNDE	Continued (Jury Trial 03/26/2013 08:15 AM)	John Hawley Jr.
	NOTH	TCFINNDE	Notice Of Hearing	John Hawley Jr.
1/18/2013	RSDS	TCTONGES	State/City Response to Discovery/ Supplemental	John Hawley Jr.
2/19/2013	RSDS	TCOLSOMC	State/City Response to Discovery / Supplemental	John Hawley Jr.
3/4/2013	MINL	TCTONGES	Motion in Limine	John Hawley Jr.
3/25/2013	MOTN	TCOLSOMC	Second Motion to Continue Jury Trial	John Hawley Jr.
3/26/2013	PTMM	TCFINNDE	Pretrial Memorandum & Notice	John Hawley Jr.
	CONT	TCFINNDE	Continued (Jury Trial 04/17/2013 08:15 AM)	John Hawley Jr.

State of Idaho vs. Wade Allen Tomlinson

Date	Code	User		Judge
3/29/2013	MOAF	TCTONGES	Motion & Affidavit of Costs	John Hawley Jr.
4/9/2013	ORDR	TCFINNDE	Order for Reimbursement of Costs of Prosecution	John Hawley Jr.
4/11/2013	OBJE	TCTONGES	Objection to Order for Reimbursement of Costs of Prosecution	John Hawley Jr.
4/15/2013	ORDR	TCFINNDE	Order Awarding Costs Against Defendant	John Hawley Jr.
4/17/2013	COMP	TCFINNDE	Complaint Filed	John Hawley Jr.
	JTST	TCFINNDE	Jury Trial Started	John Hawley Jr.
	HRHD	TCFINNDE	Hearing result for Jury Trial scheduled on 04/17/2013 08:15 AM: Hearing Held	John Hawley Jr.
	FIGT	TCFINNDE	Finding of Guilty (I18-8004 {M} Driving Under the Influence)	John Hawley Jr.
	STAT	TCFINNDE	STATUS CHANGED: closed pending clerk action	John Hawley Jr.
	HRSC	TCFINNDE	Hearing Scheduled (Sentencing 05/13/2013 01:30 PM)	John Hawley Jr.
	NOTH	TCFINNDE	Notice Of Hearing	John Hawley Jr.
	VERD	TCWEGEKE	Verdict Form	Michael McLaughlin
	JRYI	TCWEGEKE	Jury Instructions	Michael McLaughlin
4/30/2013	EVAL	TCCHRIKE	Evaluation Received	John Hawley Jr.
5/13/2013	HRHD	TCFINNDE	Hearing result for Sentencing scheduled on 05/13/2013 01:30 PM: Hearing Held	John Hawley Jr.
	WHJD	TCFINNDE	Withheld Judgment Entered (I18-8004 {M} Driving Under the Influence)	John Hawley Jr.
	OSDL	TCFINNDE	Order Suspending Drivers License Driver License 180 Days	John Hawley Jr.
	JAIL	TCFINNDE	Sentenced to Jail or Detention (I18-8004 {M} Driving Under the Influence) Confinement terms: Jail: 90 days. Suspended jail: 85 days. Credited time: 2 days.	John Hawley Jr.
	PROB	TCFINNDE	Probation Ordered (I18-8004 {M} Driving Under the Influence) Probation term: 1 year 0 months 0 days. (Misdemeanor Unsupervised)	John Hawley Jr.
	SNPF	TCFINNDE	Sentenced To Pay Fine 947.50 charge: I18-8004 {M} Driving Under the Influence	John Hawley Jr.
	CBTF	TCFINNDE	Cash Bond to Fines. Appearance - Charge: I18-8004 {M} Driving Under the Influence	John Hawley Jr.
	OSOO	TCFINNDE	Other Sentencing Option Ordered: Alcohol/DUI Education Classes Hours assigned: 8	John Hawley Jr.
	OSOO	TCFINNDE	Other Sentencing Option Ordered: Victims Panel	John Hawley Jr.
	TRDL	TCFINNDE	Temporary Restricted License Issued	John Hawley Jr.
	NDRS	TCOLSOMC	Notice of Defendant's Responsibilities after Sentencing	John Hawley Jr.
5/16/2013	BNDV	TCPARKTL	Bond Converted (Receipt number 56160 dated 5/16/2013 amount 500.00)	John Hawley Jr.

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State of Idaho vs. Wade Allen Tomlinson

Date	Code	User		Judge
5/16/2013	ORDR	TCWEGEKE	Order Releasing Cash Bond	Michael McLaughlin
5/29/2013	NOSP	TCPRESCS	Notification Of Subsequent Penalties (DUI)	John Hawley Jr.
6/3/2013	ASAE	TCTONGES	Alcohol / Substance Abuse Education Complete / (8 hours)	John Hawley Jr.
6/17/2013	VPC	TCTONGES	Victim's Impact Panel Completed	John Hawley Jr.
	MOTN	TCTONGES	Rule 35 Motion to Reduce Sentence	John Hawley Jr.
	MEMO	TCTONGES	Memorandum in Support of Rule 35 Motion to Reduce Sentence	John Hawley Jr.
6/19/2013	CSAC	TCCHRIKE	Community Service Completed	John Hawley Jr.
6/24/2013	APDC	TCTONGES	Appeal Filed In District Court	John Hawley Jr.
	NOTA	TCTONGES	NOTICE OF APPEAL	John Hawley Jr.
	CAAP	TCTONGES	Case Appealed:	John Hawley Jr.
	STAT	TCTONGES	STATUS CHANGED: Reopened	John Hawley Jr.
	CHGA	TCTONGES	Judge Change: Administrative	Michael McLaughlin
7/1/2013	ESTM	TCCHRIKE	Estimate Cost of Appeal Transcript	Michael McLaughlin
7/8/2013	ORDR	TCLYCAAM	Order Governing Procedure on Appeal	Michael McLaughlin
	HRSC	TCLYCAAM	Hearing Scheduled (Oral Argument on Appeal 12/19/2013 03:00 PM)	Michael McLaughlin
8/29/2013	MDIS	TCTONGES	Motion To Dismiss Appeal	Michael McLaughlin
8/30/2013	MDIS	TCTONGES	Objection to Motion To Dismiss Appeal	Michael McLaughlin
9/3/2013	NOTC	TCCHRIKE	Notice of Lodging of Appeal Transcript	Michael McLaughlin
9/12/2013	NOTC	TCCHRIKE	Notice of Withdrawal of Motion to Dismiss	Michael McLaughlin
10/3/2013	ORDR	TCWEGEKE	Conditional Order Dismissing Appeal	Michael McLaughlin
10/15/2013	MOTE	TCOLSOMC	Motion to Extend Time to File Appellant's Brief	Michael McLaughlin
10/17/2013	ORDR	TCEDWAAM	Order Extending Time For Filing Appellant's Brief	Michael McLaughlin
	CONT	TCEDWAAM	Continued (Oral Argument on Appeal 01/16/2014 01:00 PM)	Michael McLaughlin
11/4/2013	MEMO	TCLANGAJ	Memorandum in Support of Appeal	Michael McLaughlin
12/2/2013	BREF	TCOLSOMC	Respondent's Brief	Michael McLaughlin
1/7/2014	MEMO	TCLANGAJ	Appellant's Reply Memorandum	Michael McLaughlin
1/16/2014	DCHH	TCEDWAAM	Hearing result for Oral Argument on Appeal scheduled on 01/16/2014 01:00 PM: District Court Hearing Held Court Reporter: K. Redlich Number of Transcript Pages for this hearing estimated: Less than 100	Michael McLaughlin
1/21/2014	DEOP	DCABBOSM	Memorandum Decision and Order	Michael McLaughlin
3/3/2014	NOTA	TCLANGAJ	NOTICE OF APPEAL	Michael McLaughlin
	APSC	TCLANGAJ	Appealed To The Supreme Court	Michael McLaughlin

Date: 4/30/2014

**Fourth Judicial District Court - Ada County**

User: TCWEGEKE

Time: 12:21 PM

**ROA Report**

Page 4 of 4

Case: CR-MD-2012-0014306 Current Judge: Michael McLaughlin

Defendant: Tomlinson, Wade Allen

State of Idaho vs. Wade Allen Tomlinson

Date	Code	User	Judge
3/11/2014		CCTHIEBJ	Miscellaneous Payment: Clerk's Record Paid by: Michael McLaughlin Smethers, David J. Receipt number: 0025874 Dated: 3/11/2014 Amount: \$100.00 (Check)
3/20/2014	NOTA	TCLANGAJ	AMENDED NOTICE OF APPEAL Michael McLaughlin
4/30/2014	NOTC	TCWEGEKE	Notice of Transcript Lodged - Supreme Court No. Michael McLaughlin 41913

000005

## IDAHO UNIFORM CITATION

IN THE DISTRICT COURT OF THE 4TH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA  
STATE OF IDAHO

## COMPLAINT AND SUMMONS

- ☐ Infraction Citation  
☒ Misdemeanor Citation  
☐ Accident Involved  
☐ Commercial Vehicle  
Driven by this Driver

DR#222-672

vs.

Tomlinson

Last Name

Wade

Allen

First Name

Middle Initial

1481950

VIN #

USDOT TK Census #

☐ Operator ☐ Class A ☐ Class B ☐ Class C ☒ Class D ☐ Other

☐ GVWR 26001 + ☐ 16 + Persons ☐ Placard Hazardous Materials IPUC#

Home Address 2530 E. Challis St. Meridian, ID 83646

Business Address \_\_\_\_\_ Ph # \_\_\_\_\_

THE UNDERSIGNED OFFICER (PARTY) HEREBY CERTIFIES AND SAYS:

☒ DL ☐ ID ☐ V I certify I have reasonable grounds, and believe the above-named Defendant,

DL or SS# \_\_\_\_\_ State ID Sex MHeight 5'11" Wt. 205 Hair BLN Eyes BLU DOB \_\_\_\_\_Veh. Lic.# 30215 State ID Yr. of Vehicle 2007Make PORS Model CAY Color GRYDid commit the following act(s) on 9-26, 20 12 at 2245 o'clock P M.

Vio. #1 DUI 18-8004  
Code Section

Vio. #2 \_\_\_\_\_  
Code Section

Location S. 10th St. / W. Front St.Hwy. \_\_\_\_\_ Mp. ADA County, Idaho.

Date 9-26-12 Officer/Party Frederick Serial #/Address 744  
Audio ☒ Video ☒ POLICE DEPT.

Date \_\_\_\_\_ Witnessing Officer \_\_\_\_\_ Serial #/Address \_\_\_\_\_ Dept. \_\_\_\_\_

THE STATE OF IDAHO TO THE ABOVE NAMED DEFENDANT:

You are hereby summoned to appear before the Clerk of the Magistrate's Court of the  
District Court of ADA County, BOISE, Idaho,  
located at 200 W. FRONT STREET on or after \_\_\_\_\_, 20\_\_\_\_,  
but on or before \_\_\_\_\_, 20\_\_\_\_, at 8 A.M.-4 o'clock P M.

I acknowledge receipt of this summons and I promise to appear at the time indicated.

Arrested  
Defendant's Signature

I hereby certify service upon the defendant personally on 9-26, 20 12  
Officer David Frederick

NOTICE: See reverse side of your copy for PENALTY and COMPLIANCE instructions.

COURT COPY VIOLATION #1

MD-12-14306

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA.

THE STATE OF IDAHO,  
*Plaintiff,*

VS.

TOMLINSON WADE ALLEN  
*Defendant*

NO. \_\_\_\_\_ FILED P.M. 9  
NOTICE OF COURT DATE  
AND  
BOND RECEIPT  
SEP 27 2012  
CHRISTOPHER D. RICH, Clerk  
By CHERYL WADA, Deputy

**YOU ARE HEREBY NOTIFIED** that you must appear before the Court Clerk,  
**between 10 October 2012 and 17 October 2012 excluding Saturdays, Sundays, and Holidays,**  
**from 09:00AM to 03:00PM at the:**  
Ada County Courthouse  
200 West Front Street  
Boise, 83702

***If you have been arrested for a Citation, This Notice of Court Date Supersedes any other Court Date for this case. If you have been given a date by the court you must keep those appearances, failing to do so will cause a warrant for arrest and forfeiture of bond.***

**You are further notified** that if you fail to appear as specified herein, your bond  
will be forfeited and a Warrant of Arrest will be issued against you.

BOND RECEIPT No: 804556

Charge: 18-8004 {M} DRIVING UNDER THE INFLUENCE

Bond Amount: \$ 500.00

Case #

Bond #

Bond Type: Cash

Warrant #:

Agency: NIKI TOMLINSON

Insurance:

Bondsman:

Address: 2530 E CHALLIS ST  
MERIDIAN, ID 83646

This is to certify that I have received a copy of this NOTICE TO APPEAR.  
I understand that I am being released on the conditions of posting bail and  
my promise to appear in the court at the time, date, and place described in this notice.

DATED: 9/27/2012

*Wade A. Tomlinson*  
DEFENDANT

000007



FA  
10/17  
3P

NO. \_\_\_\_\_ FILED 4:50  
A.M. \_\_\_\_\_ P.M.

OCT - 1 2012

CHRISTOPHER D. RICH, Clerk  
By ELAINE TONG  
DEPUTY

JOHN C. DEFRANCO, ESQ., ISB #4953  
ELLSWORTH, KALLAS & DEFRANCO P.L.L.C.  
1031 E. Park Blvd.  
Boise, ID 83712  
Phone: (208) 336-1843  
Fax: (208) 345-8945

ATTORNEY FOR DEFENDANT

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

STATE OF IDAHO, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
WADE TOMLINSON, )  
 )  
Defendant. )  
\_\_\_\_\_ )

Case No.: CR-MD-2012-0014306

**NOTICE OF APPEARANCE**

COMES NOW John C. DeFranco, and hereby enters his appearance as the  
Attorney of Record for the above-named Defendant. The Defendant hereby enters a plea  
of not guilty and requests the matter be set over for pretrial conference and jury trial.

Please direct all notices or pleadings through this office.

DATED this 15<sup>th</sup> day of October, 2012.

  
\_\_\_\_\_  
JOHN C. DeFRANCO

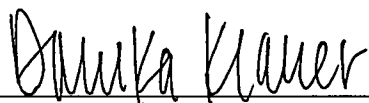
**ORIGINAL**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 1<sup>st</sup> day of October, 2012, a true and correct copy of the foregoing document was served upon counsel as follows:

Boise City Prosecuting Attorney  
P.O. Box 500  
Boise, Idaho 83701

☐ U.S. Mail  
☐ Hand Delivery  
☒ Facsimile: 384-4454

  
\_\_\_\_\_  
Danika Kramer, Legal Assistant

OCT - 1 2012

CHRISTOPHER D. RICH, Clerk  
By ELAINE TONG  
DEPUTY

JOHN C. DEFRANCO, ESQ., ISB #4953  
ELLSWORTH, KALLAS & DEFRANCO, P.L.L.C.  
1031 E. Park Blvd.  
Boise, ID 83712  
Phone: (208) 336-1843  
Fax: (208) 345-8945

ATTORNEY FOR DEFENDANT

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

STATE OF IDAHO,	)	
	)	
Plaintiff,	)	Case No.: CR-MD-2012-0014306
	)	
vs.	)	<b>REQUEST FOR DISCOVERY</b>
	)	
WADE TOMLINSON,	)	
	)	
Defendant.	)	
_____	)	

TO: BOISE CITY PROSECUTING ATTORNEY

**PLEASE TAKE NOTICE** that the undersigned, pursuant to Rule 16 of the Idaho Criminal Rules, requests discovery and photocopies of the following information, evidence, and materials:

1. All material or information within the prosecutor's possession or control, or which thereafter comes into his possession or control, which tends to negate the guilt of the accused or tends to reduce the punishment therefore. I.C.R. 16(a).
2. All written or recorded statements or oral admissions of the defendant within the possession, custody, control, or knowledge of the State.
3. All written or recorded statements or oral admissions of any co-defendant within the possession, custody, control or knowledge of the State.

**ORIGINAL**

REQUEST FOR DISCOVERY

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4. Any prior criminal record of the defendant and co-defendant, if any.
5. All documents and tangible objects as defined by I.C.R. 16(b) (4) in the possession or control of the prosecutor which are material to the defense, intended for use by the prosecutor or obtained from or belonging to the defendant or co-defendant.
6. All reports of physical or mental examinations and of scientific tests or experiments within the possession, control or knowledge of the prosecutor, the existence of which is known or is available to the prosecutor by the exercise of due diligence including the results of any forensic testing.
7. A written list of the names, addresses, records of prior felony convictions, and written or recorded statements of all persons having knowledge of facts of the case known to the prosecutor and his agents or any official involved in the investigatory process of the case.
8. All reports or memoranda made by police officers or investigators in connection with the investigation or prosecution of the case, including ticket notes.
9. Any writing or object that may be used to refresh the memory of all persons who may be called as witnesses, pursuant to I.R.E. 612.

The undersigned further requests written compliance within 14 days of service of this request.

DATED this 18 day of October, 2012.



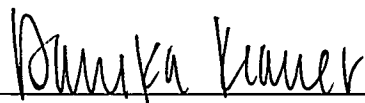
John C. DeFranco  
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 1<sup>st</sup> day of October, 2012, I served a true and correct copy of the within and foregoing document by the method indicated below and addressed to the following:

Boise City Prosecuting Attorney  
P.O. Box 500  
Boise, Idaho 83701

☐ US Mail  
☒ Hand Delivery  
☒ Facsimile: 384-4454

  
\_\_\_\_\_  
Danika Kramer, Legal Assistant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA  
MAGISTRATE DIVISION

200 W. Front Street, Boise Idaho 83702

STATE OF IDAHO,  
Plaintiff.

vs.

Wade Allen Tomlinson  
2530 East Challis  
Meridian, ID 83646

Defendant.

Case No: CR-MD-2012-0014306

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that the above-entitled case is hereby set for:

BC Pretrial Conference....Monday, November 19, 2012....09:45 AM

Judge: John Hawley Jr.

Jury Trial....Thursday, December 13, 2012....08:15 AM

Judge: John Hawley Jr.

I HEREBY CERTIFY that the foregoing is a true and correct copy of this Notice of Hearing entered by the court and on file in this office. I further certify that copies of this notice were served as follows:

Defendant: Mailed \_\_\_\_\_ Hand Delivered \_\_\_\_\_ Signature \_\_\_\_\_  
Clerk \_\_\_\_\_ Date \_\_\_\_\_ Phone ( ) \_\_\_\_\_

John C DeFranco  
1031 E Park Blvd  
Boise ID 83712

Private Counsel: Mailed \_\_\_\_\_ Hand Delivered \_\_\_\_\_ Signature \_\_\_\_\_  
Clerk \_\_\_\_\_ Date 10/10/12 Phone ( ) \_\_\_\_\_

Prosecutor: Interdepartmental Mail \_\_\_\_\_ ☐ Ada ☐ Boise ☐ Eagle ☐ G.C. ☐ Meridian  
Clerk \_\_\_\_\_ Date 10/10/12

Public Defender: Interdepartmental Mail \_\_\_\_\_  
Clerk \_\_\_\_\_ Date \_\_\_\_\_

Other: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Mailed \_\_\_\_\_ Hand Delivered \_\_\_\_\_ Signature \_\_\_\_\_  
Clerk \_\_\_\_\_ Date \_\_\_\_\_ Phone ( ) \_\_\_\_\_

Dated: 10/2/2012

CHRISTOPHER D. RICH  
Clerk of the Court

By: \_\_\_\_\_  
Deputy Clerk

**OCT - 4 2012**

**CHRISTOPHER D. RICH, Clerk**  
By **ELAINE TONG**  
DEPUTY

**CARY B. COLAIANNI**  
**BOISE CITY ATTORNEY**

Michael Dean  
Assistant City Attorney  
BOISE CITY ATTORNEY'S OFFICE  
P.O. Box 500  
Boise, Idaho 83701-0500  
Telephone: (208) 384-3870  
Idaho State Bar No. 6635

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE**  
**STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE STATE OF IDAHO,	)	
	)	
Plaintiff,	)	Case No. CR-MD-2012-0014306
	)	
v.	)	
	)	
WADE ALLEN TOMLINSON,	)	<b>RESPONSE TO REQUEST</b>
	)	<b>FOR DISCOVERY</b>
Defendant.	)	
	)	
	)	

COMES NOW, the state of Idaho, by and through Michael Dean, Assistant City Attorney, and submits the following Response to Request for Discovery in compliance with Idaho Criminal Rule 16(d)(2)A. Wherein, the State has provided an unredacted color copy of the response for defense counsel, and a redacted white copy for Defendant. In both copies the State has furnished the following information, evidence, and materials:

1. Copies of:

- Idaho State Police Forensic Services Certificate of Calibration for Instrument Serial No. #90205662
- Certificate of Analysis/Approval for Solution Lot #12801
- Boise Police Department Officer Certification Records for the Intoxilyzer 5000 series or Lifeloc FC20
- Ada County Jail Booking Sheet(s)
- Ada County Jail Arresting Officers Form
- Lifeloc Technologies, Inc - result form
- DUI General Report DR# 2012-222672 Ofc. Frederick

Boise Police Department General Report DR# 2012-222672 Ofc. Frederick  
Boise Police Department Field Sobriety Test Report DR# 2012-222672 Ofc. Frederick  
Boise Police Department Supplemental Report DR# 2012-222672 Ofc. Frederick  
Boise Police Department Report Photos DR# 2012-222672 Ofc. Frederick  
Probable Cause Affidavit in Support of Arrest and/or Refusal to Take Test  
Notice of Suspension for Failure of Evidentiary Testing  
Boise Police Department Idaho Uniform Citation #1481950  
Idaho Drivers License Record(s)  
acar

2. Defendant advised of existence and allowed access to when available (for audio or video tapes, see paragraph #7):

Intox 5000 series Instrument or Lifeloc FC20 Operations Log for Serial Number 90205662  
Audio Tape and/or Digital Audio Recording(s)

3. Results of examination and tests:

Lifeloc/Intoxilyzer Breath Test Results: .083/.082

4. The State intends to call as witnesses:

**Idaho State Police Forensic Lab Representative**, PO Box 700, Meridian, ID 83680  
(208) 884-7170

**Rachel Cutler and/or Designee**, Idaho State Police Forensic Lab Representative, PO Box 700, Meridian, ID 83680 (208) 884-7170

**Niki Angela Tomlinson**, 2530 E. Challis Street Meridian, ID 83646, No Phone Number Available

**Officer David G. Frederick Ada #744**, Boise Police Department, 333 N. Mark Stall Place, Boise, ID 83704, (208) 570-6000

**Officer Josiah C. Ransom Ada #797**, Boise Police Department, 333 N. Mark Stall Place, Boise, ID 83704, (208) 570-6000

**Officer Josiah C. Ransom Ada #797**, Boise Police Department, 333 N. Mark Stall Place, Boise, ID 83704, (208) 570-6000

And any other individuals identified in the discovery materials.

5. The Idaho criminal history for Defendant and/or witnesses, if such history exists, can be found using the on-line *Idaho Supreme Court Data Repository* at: <https://www.idcourt.us>
6. There may be other relevant information or documents on this case contained in the Court file.
7. If the citation and/or police report reflect the existence of audio or video recording(s), please email a request to [BCAO@cityofboise.org](mailto:BCAO@cityofboise.org) including the case number and the name of the defendant OR contact the legal secretary for the undersigned to make arrangements to do one of the following:



- a) Have the digital audio tape sent electronically to a secure FTP program for you to download to your local machine. You will be notified via email when it is ready to download;
- b) Listen and/or view the audiotape, videotape, and/or CD at the Boise City Attorney's office;
- c) Make or obtain a copy of the audio file, video file or compact disc at our office using our high-speed dubbing machine or downloading the file to a CD or USB drive.

8. Intoxilyzer 5000 series or Lifeloc FC20 Maintenance Log and Records:

- a) Maintenance conducted on the instrument is noted on the Intox. 5000 series Instrument Operations Log or Lifeloc FC20 Log; no separate maintenance log is kept. All internal maintenance is reflected in a voluminous collection of maintenance documents; copies of said maintenance documents are kept at the Boise City Attorney's Office. Defense counsel may make arrangements to view said copies by contacting the handling attorney in this case.

9. Documents Relating to the Intoxilyzer 5000 series Detecting Acetone or Other Interfering Substances:

- a) Please refer to the *Idaho Intoxilyzer 5000 Series Reference Manual*, pages 25 & 29 for relevant information. See below for how to obtain said manuals.

10. Intoxilyzer Manual and Lifeloc FC20 Manual:

- a) Manuals relating to the Intoxilyzer and the Lifeloc FC20 may be obtained via the Internet at <http://www.isp.idaho.gov/forensic/certificates.html#CofA>

11. Certificate of Analysis for the Solution Lot:

- a) The Certificate of Analysis for the Solution Lot may also be found on the Idaho State Police Forensic Services website at:  
<http://www.isp.idaho.gov/forensic/certificates.html#CofA>
- b) For certificates that are not listed on the webpage, please contact Forensic Services at P.O. Box 700, Meridian, ID 83680-0700, 208-884-7219.

12. Alco-Sensor:

- a) No similar records are maintained on the hand-held Alco-Sensor because the instrument is used merely to detect the presence of alcohol, not to obtain a specific BAC.

13. Officer Certification and Training Records:

- a) The list containing officer certification information is attached hereto. Defense counsel may submit a specific written request to the POST Academy care of Trish Christy, 700 S. Stratford Drive, Meridian, Idaho 83642 for information regarding

a specific officer's training history, including which year (color) of N.H.T.S.A. training manual was used and if/when the officer may have taken a refresher training. If counsel has questions regarding the request, they may contact Ms. Christy at 208-884-7253.

14. The State recognizes its on-going duty to supplement this Response to Discovery should additional evidence relevant to this case arise.

DATED this 3 day of October, 2012.



Michael Dean  
Assistant City Attorney

**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that on this 3 day of October, 2012, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

John C. DeFranco  
ELLSWORTH, KALLAS, TALBOY & DEFRANCO, PLLC  
Attorneys at Law  
1031 E. Park Blvd  
Boise, Idaho 83712

☐ INTERDEPARTMENT MAIL  
☐ FACSIMILE  
☐ HAND DELIVER  
☐ US MAIL

☒ ELECTRONIC to: jcd@greyhawklaw.com  
joefrontdesk@me.com  
danika@greyhawklaw.com



OCT - 4 2012

CHRISTOPHER D. RICH, Clerk  
By ELAINE TONG  
DEPUTY

CARY B. COLAIANNI  
BOISE CITY ATTORNEY

Michael Dean  
Assistant City Attorney  
BOISE CITY ATTORNEY'S OFFICE  
P.O. Box 500  
Boise, Idaho 83701-0500  
Telephone: (208) 384-3870  
Idaho State Bar No. 6635

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO,

Plaintiff,

v.

WADE ALLEN TOMLINSON,

Defendant.

Case No. CR-MD-2012-0014306

**REQUEST FOR DISCOVERY**

**TO: John C. DeFranco:**

**PLEASE TAKE NOTICE** that the undersigned, pursuant to Rule 16 of the Idaho Criminal Rules, requests discovery and inspection of the following information, evidence and materials:

1. **DOCUMENTS AND TANGIBLE OBJECTS** -- Books, papers, documents, photographs, tangible objects or copies or portions thereof, which are within the possession, custody or control of the defendant, and which the defendant intends to introduce in evidence at trial.

2. **REPORTS OF EXAMINATION AND TESTS** -- Any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with this case, or copies thereof, within the possession or control of Defendant, which defendant intends to introduce in evidence at the trial, or which were prepared by a 000018  
REQUEST FOR DISCOVERY - 1 act

whom Defendant intends to call at the trial when the results or reports relate to testimony of the witness.

3. **DEFENSE WITNESSES** – Name(s), address(es), and phone number(s) of any witnesses Defendant intends to call at trial.

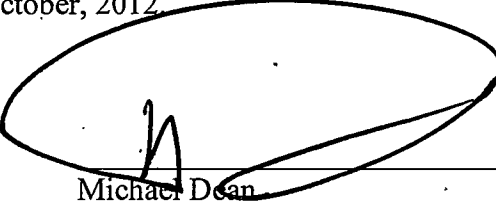
4. **EXPERT WITNESSES** – Name(s), address(es), and phone number(s) of any expert witness Defendant intends to call at trial. With respect to each expert witness, please provide a written summary describing the testimony the witness intends to introduce, including the witness's opinions, the facts and data for those opinions, and the witness's qualifications.

The undersigned further requests permission to inspect and copy said information, evidence and materials prior to the 17th day of October, 2012, at a time and place mutually agreeable to the parties hereto.

**FURTHER**, please take notice that the undersigned prosecutor, pursuant to Idaho Code Section 19-519, demands the defendant to serve, within ten (10) days, upon the prosecutor, a written notice of defendant's intention to offer alibi. Such notice shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi.

**YOU ARE FURTHER** notified of the requirement to disclose any additional witnesses promptly to the prosecutor named below as they become known to you.

DATED this 3 day of October, 2012.

  
\_\_\_\_\_  
Michael Dean  
Assistant City Attorney

**CERTIFICATE OF MAILING**

I **HEREBY CERTIFY** that on this 3 day of October, 2012, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

John C. DeFranco  
ELLSWORTH, KALLAS, TALBOY & DEFRANCO, PLLC  
Attorneys at Law  
1031 E. Park Blvd  
Boise, Idaho 83712

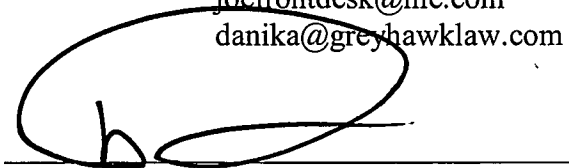
☐ **INTERDEPARTMENT MAIL**

☐ **FACSIMILE**

☐ **HAND DELIVER**

☐ **US MAIL**

☒ **ELECTRONIC to:** jcd@greyhawklaw.com  
joefrontdesk@me.com  
danika@greyhawklaw.com

A handwritten signature in black ink, appearing to be "John C. DeFranco", is written over a horizontal line.

OCT-18-2012(THU) 17:02 Salaz & Gatewood, PLLC.

(FAX)208 3361263

P.001/001

NO. \_\_\_\_\_  
A.M. \_\_\_\_\_ FILED P.M. 1:50

OCT 19 2012

DAVID J. SMETHERS  
SALLAZ & GATEWOOD  
Attorneys at Law  
1000 S. Roosevelt St.  
Boise, Idaho 83705  
208-336-1145  
FAX 208-336-1263

CHRISTOPHER D. RICH, Clerk  
By ELAINE TONG  
DEPUTY

Attorneys for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO )

Plaintiff, )

vs. )

TOMLINSON, Wade A. )

Defendant )

CASE NO. MD-2012-14306

SUBSTITUTION OF COUNSEL

Notice is given that David J. Smethers is hereby entering this case as counsel of record.

David J. Smethers 10-18-12 John C. DeFranco 10/18/12  
Date Date

CERTIFICATE OF SERVICE: This certifies that a true and correct copy of the above and forgoing instrument was: \_\_\_ Mailed; ☒ Faxed; \_\_\_ Hand Delivered, to:

\_\_\_ Ada County Prosecutor;

\_\_\_ Boise County Prosecutor;

☒ Boise City Prosecutor;

Dated this 19 day of Oct, 2012

David J. Smethers

DAVID J. SMETHERS  
Attorney at Law  
1000 S. Roosevelt St.  
Boise, Idaho 83705  
208-336-1145  
FAX-208-336-1263

Attorney for Defendant

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 1:50

OCT 19 2012

CHRISTOPHER D. RICH, Clerk  
By ELAINE TONG  
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO	)	
	)	CASE NO. MD-2012-14306
Plaintiff,	)	
	)	REQUEST FOR DISCOVERY
vs.	)	
	)	
TOMLINSON, Wade A.	)	
	)	
Defendant.	)	
	)	


PLEASE TAKE NOTICE that the undersigned, pursuant to Rule 16 of the Idaho Criminal Rules, requests discovery and inspection of the following information, evidence and materials, as defined in said Rule:

1. Statement(s) of defendant;
2. Statement(s) of co-defendant(s);
3. Defendant's prior record;
4. Documents and tangible objects;
5. Reports of examinations and tests;
6. State's witnesses;
7. Names, addresses, phone number(s), and contact information of potential witnesses;
8. Names, addresses, phone number(s), and contact information of persons with any knowledge concerning this incident;
9. Names, addresses, phone number(s), and contact information of all persons that law enforcement or state investigators had contact with concerning this incident;
10. Prior criminal records of all witnesses that the state intends to call;
11. Exculpatory evidence;
12. Copies of all audio or video recordings of the investigation or its initiation in this matter;

13. Curriculum vitae of any expert witness(s), and any underlying facts or data on which said witness(s) relies; written summary of expert's expected testimony, including opinions, the bases of, and reasons therefore.
14. Ticket notes;
15. Investigative notes from all persons related to the investigation of this incident, including the Victim/Witness Coordinator, and a summary of all contacts and discussions between said Victim/Witness Coordinator, the alleged victim, and any other witness or potential witness with which the coordinator had contact;
16. Agreements and/or contracts for all confidential informants or persons with information related to this incident;
17. Maintenance and calibration records for speedometers and odometers for any law enforcement vehicle utilized in this case;

Further, defendant requests any/all information, dates, and terms concerning any grand jury proceedings relating to the defendant and/or incidents associated with this case/series of events.

YOU ARE FURTHER NOTIFIED That you must file and serve a written response within fifteen (14) days of the service of this Request by filing the original with the above entitled Court and serving a copy on counsel for the defendant herein.

  
David J. Smethers  
Attorney at Law

10-19-12  
Date

CERTIFICATE OF SERVICE: This certifies that a true and correct copy of the above and forgoing instrument was: ☐ Mailed ☐ Hand Delivered ☒ Faxed, to:

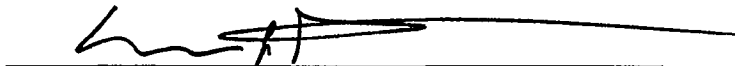
☐ Boise County P.A.;

☐ Ada County P.A.;

☒ Boise City P.A.;

\_\_\_\_\_

Dated this 19 day of October, 2012.

  
David J. Smethers



FILED 11/19/12 AT 9:59 A.M.  
 CHRISTOPHER D. RICH,  
 CLERK OF THE DISTRICT COURT  
 BY [Signature]  
 Deputy

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO

Plaintiff,

vs.

WADE TOMLINSON

Defendant.

Case No. CRMD 12-1432

TRIAL STATUS MEMORANDUM

Appearances: Prosecutor [Signature]  
 Defense Counsel [Signature]

- ☐ This case is ready for trial.
- ☐ Discovery has been completed.
- ☒ Cut-off date for discovery is 1 week prior.
- ☒ State is to prepare a formal complaint for trial. (by 1 week prior)
- ☐ Parties are to prepare proposed jury instruction on the elements of count(s) \_\_\_\_\_.
- ☐ The State does not intend to amend the charge.
- ☐ The State may amend the charge to \_\_\_\_\_.
- ☐ The parties anticipate the case can be tried in one day.
- ☐ Courtroom media equipment will be needed. (The attorneys are responsible for the presentation of evidence.)
- ☐ Motions subject to Idaho Criminal Rule 12(b) have been heard.
- ☐ Other \_\_\_\_\_

[Signature]  
 Prosecuting Attorney

[Signature]  
 Defense Counsel

11-19-12  
 Date

[Signature]  
 Magistrate

DEC - 7 2012

CHRISTOPHER D. RICH, Clerk  
By ELAINE TONG  
DEPUTY

CARY B. COLAIANNI  
BOISE CITY ATTORNEY

Sarah A. Millar  
Assistant City Attorney  
BOISE CITY ATTORNEY'S OFFICE  
P.O. Box 500  
Boise, Idaho 83701-0500  
Telephone: (208) 384-3870  
Idaho State Bar No. 7439

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE STATE OF IDAHO,	)	
	)	
Plaintiff,	)	Case No. CR-MD-2012-0014306
	)	
v.	)	
	)	<b>SUPPLEMENTAL RESPONSE TO</b>
WADE ALLEN TOMLINSON,	)	<b>REQUEST FOR DISCOVERY</b>
	)	
Defendant.	)	
	)	

---

COMES NOW, the state of Idaho, by and through Sarah A. Millar, Assistant City Attorney, and submits the following Supplemental Response to Request for Discovery:

The State has complied with such request by furnishing the following additional information, evidence, and/or materials:

1. Expert Witness Testimony Disclosure:


Depending on the issues that arise at trial, Ms. Cutler may testify as to the design and purpose of the Lifeloc FC20 instrument and how the instrument works. Part of that testimony may include how the design ensures that external factors will not affect the accuracy of the breath sample. She may also testify as to the measurement of

SUPPLEMENTAL RESPONSE TO REQUEST FOR DISCOVERY - 1 000025

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uncertainty for the Lifeloc FC20 in general and how that measurement of uncertainty applies in this case specifically. Ms. Cutler may also testify that errors in following the standard operating procedures regarding taking a breath sample do not ultimately affect the validity of the test results.

DATED this 7 day of December, 2012.



Sarah A. Millar  
Assistant City Attorney

**CERTIFICATE OF MAILING**

I **HEREBY CERTIFY** that on this 7 day of December, 2012, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

David J. Smethers  
Attorney at Law,  
1000 S. Roosevelt St.  
Boise, Idaho 83705

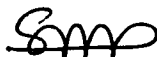
☐ **US MAIL**

☐ **INTERDEPARTMENT MAIL**

☐ **FACSIMILE**

☐ **HAND DELIVER**

☒ **ELECTRONIC To:** davidj@smetherslaw.com  
tracy@sallazlaw.com



DEC - 7 2012

CHRISTOPHER D. RICH, Clerk  
By ELAINE TONG  
DEPUTY

CARY B. COLAIANNI  
BOISE CITY ATTORNEY

Sarah A. Millar  
Assistant City Attorney  
BOISE CITY ATTORNEY'S OFFICE  
P.O. Box 500  
Boise, Idaho 83701-0500  
Telephone: (208) 384-3870  
Idaho State Bar No. 7439

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE STATE OF IDAHO,	)	
	)	
Plaintiff,	)	Case No. CR-MD-2012-0014306
	)	
v.	)	
	)	<b>SUPPLEMENTAL RESPONSE TO</b>
WADE ALLEN TOMLINSON,	)	<b>REQUEST FOR DISCOVERY</b>
	)	
Defendant.	)	
	)	

---


COMES NOW, the state of Idaho, by and through Sarah A. Millar, Assistant City Attorney, and submits the following Supplemental Response to Request for Discovery:

The State has complied with such request by furnishing the following additional information, evidence, and/or materials:

1. Disclosure:

Sworn Complaint to be filed the day of Jury Trial

DATED this 6 day of December, 2012.

  
\_\_\_\_\_  
Sarah A. Millar  
Assistant City Attorney

**CERTIFICATE OF MAILING**

I **HEREBY CERTIFY** that on this 6 day of December, 2012, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

David J. Smethers  
Attorney at Law,  
1000 S. Roosevelt St.  
Boise, Idaho 83705

☐ **US MAIL**  
☐ **INTERDEPARTMENT MAIL**  
☐ **FACSIMILE**  
☐ **HAND DELIVER**  
☒ **ELECTRONIC To:** davidj@smetherslaw.com  
tracy@sallazlaw.com

  
\_\_\_\_\_

FILED  
8:30 P.M.  
Thurs December 13, 2012  
CHRISTOPHER D. RICH, CLERK OF THE COURT  
BY: D FINNEGAN  
DEPUTY CLERK

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA  
MAGISTRATE DIVISION**

200 W. Front Street, Boise Idaho 83702

STATE OF IDAHO,  
Plaintiff:

vs.

Wade Allen Tomlinson  
2530 East Challis  
Meridian, ID 83646

Defendant.

Case No: CR-MD-2012-0014306

**NOTICE OF HEARING**

**NOTICE IS HEREBY GIVEN** that the above-entitled case is hereby set for:

Jury Trial....Tuesday, February 12, 2013....08:15 AM  
Judge: John Hawley Jr.

I HEREBY CERTIFY that the foregoing is a true and correct copy of this Notice of Hearing entered by the court and on file in this office. I further certify that copies of this notice were served as follows:

Defendant: Mailed ☒ Hand Delivered \_\_\_\_\_ Signature \_\_\_\_\_  
Clerk JP Date 12/20 Phone ( ) \_\_\_\_\_

David J Smethers  
1000 S. Roosevelt Street  
Boise ID 83705

Private Counsel: Mailed ☒ Hand Delivered \_\_\_\_\_ Signature \_\_\_\_\_  
Clerk JP Date 12/20 Phone ( ) \_\_\_\_\_

Prosecutor: Interdepartmental Mail ☒ ☐ Ada ☒ Boise ☐ Eagle ☐ G.C. ☐ Meridian  
Clerk JP Date 12/20

Public Defender: Interdepartmental Mail \_\_\_\_\_  
Clerk \_\_\_\_\_ Date \_\_\_\_\_

Other: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Mailed \_\_\_\_\_ Hand Delivered \_\_\_\_\_ Signature \_\_\_\_\_  
Clerk \_\_\_\_\_ Date \_\_\_\_\_ Phone ( ) \_\_\_\_\_

Dated: 12/13/2012

CHRISTOPHER D. RICH  
Clerk of the Court

By: Risa Posey  
Deputy Clerk

DEC 13 2012

CHRISTOPHER D. RICH, Clerk  
By DEIRDRE FINNEGAN  
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, ADA COUNTY, MAGISTRATE DIVISION

STATE OF IDAHO,

Plaintiff,

vs.

Tomlinson, Wade

Defendant.

Case No. CR MD 12 14306

PRE-TRIAL MEMORANDUM  
AND MINUTE ENTRY

☒ In Chambers

Appearances: ☐ AC ☒ BC ☐ EC ☐ GC ☐ MC Prosecutor Miller

Defense Counsel Smethers Interpreter \_\_\_\_\_

☐ Jury trial waived and case is to be re-set for court trial.

☐ Plea and sentence via Defense Counsel authorized by Defendant: Rule 6(d), IMR  
and/or IIR.

☐ Pre-trial motions, timely filed, are set for hearing on \_\_\_\_\_, at  
\_\_\_\_\_.m.

☒ Case is re-set for 2/12/13 at 8:15 a.m.

☐ Defendant failed to appear. Absence not explained, justified, or excused.  
Trial date vacated. Bond forfeited/ROR revoked. Bench Warrant issued.  
Bond set at \$ \_\_\_\_\_.

☒ Other: Reset at D's request. D waives speedy &  
State does not object to continuance, but notes that all witnesses  
including expert were available today for trial & would like  
consideration in the future regarding continuances for unavailability.

Dated this 13 day of December, 2012.

Defendant [Signature]  
Address: \_\_\_\_\_

Telephone: \_\_\_\_\_

Clerk: DF

Counsel for Defendant [Signature]

Deputy Prosecuting Attorney [Signature]

Magistrate Judge [Signature]

202  
JF  
2/12  
8/15

NO. 230  
FILED  
A.M. 3 P.M.

DAVID J. SMETHERS  
1000 S. Roosevelt St.  
Boise, Idaho 83705  
208-336-1145  
Fax 208-336-1263

JAN 07 2013

CHRISTOPHER D. RICH, Clerk  
By KATRINA CHRISTENSEN  
DEPUTY

Attorney for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO	)	
	)	CASE NO. CR-2012-4306
Plaintiff,	)	14306
	)	MOTION TO VACATE AND RE-SET
vs.	)	
	)	JURY TRIAL
TOMLINSON, Wade	)	
	)	
Defendant.	)	
_____	)	

Comes now the defendant, by and through his attorney of record, and requests a new jury trial date in this case. The defendant has heretofore waived his right to speedy trial. The initial jury trial was vacated and re-set by stipulation upon motion by the defendant. Counsel is out of state on the jury trial date now set of February 12, 2013. Enclosed please find a calendar with counsel's available dates. A proposed ORDER accompanies this MOTION.

[Signature] 1-6-13  
David J. Smethers, Attorney at Law Date

CERTIFICATE OF SERVICE

I hereby certify that on the 6 day of Jan., 2013, a true and correct copy of the foregoing document was:

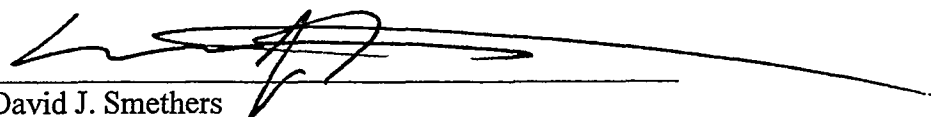
       Hand delivered ☒ Faxed        Mailed to the:



\_\_\_\_\_ Boise County Prosecutor

\_\_\_\_\_ Ada County Prosecutor

\_\_\_\_\_ Boise City Prosecutor

  
\_\_\_\_\_ David J. Smethers

JAN 11 2013

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

CHRISTOPHER D. RICH, Clerk  
By DEIRDRE FINNEGAN  
DEPUTY

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO )

Plaintiff, )

vs. )

TOMLINSON, Wade )

Defendant. )

CASE NO. CR-2012-14306

ORDER VACATING AND RE-SETTING

JURY TRIAL

RECEIVED

JAN 07 2013

Ada County Clerk

After consideration of the defendant's motion and review of the Court file, the jury trial now set is vacated and re-set to the 26<sup>th</sup> day of March, 2013, at the hour of 8:15 AM.. So Ordered.

John Hawley Jr., Magistrate Judge

1.11.13  
Date

(SEAL)

### CERTIFICATE OF MAILING

I hereby certify that on the \_\_\_\_\_ day of \_\_\_\_\_, 2013, a true and correct copy of the foregoing Order Dismissing this case was served by placing the same in the respective courthouse mail boxes or by regular service to the following:

#### FILE COPY

Copy to: Boise City Prosecutor;  
Copy to: David J. Smethers

DEPUTY CLERK

cc: BC, A<sup>2</sup>  
1/11/13  
DF

# Calendar for year 2013 (United States)

<b>January</b> Su Mo Tu We Th Fr Sa 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 4:\ 11:\ 18:\ 26:	<b>February</b> Su Mo Tu We Th Fr Sa 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 3:\ 10:\ 17:\ 25:	<b>March</b> Su Mo Tu We Th Fr Sa 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 4:\ 11:\ 19:\ 27:
<b>April</b> Su Mo Tu We Th Fr Sa 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 3:\ 10:\ 18:\ 25:	<b>May</b> Su Mo Tu We Th Fr Sa 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 2:\ 9:\ 18:\ 25: 31:\	<b>June</b> Su Mo Tu We Th Fr Sa 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 8:\ 16:\ 23: 30:\
<b>July</b> Su Mo Tu We Th Fr Sa 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 8:\ 15:\ 22: 29:\	<b>August</b> Su Mo Tu We Th Fr Sa 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 6:\ 14:\ 20: 28:\	<b>September</b> Su Mo Tu We Th Fr Sa 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 5:\ 12:\ 19: 26:\
<b>October</b> Su Mo Tu We Th Fr Sa 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 4:\ 11:\ 18: 26:\	<b>November</b> Su Mo Tu We Th Fr Sa 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 3:\ 10:\ 17:\ 25:	<b>December</b> Su Mo Tu We Th Fr Sa 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 2:\ 9:\ 17: 25:\

## Holidays and Observances:

Jan 1 New Year's Day	Sep 2 Labor Day
Jan 21 Martin Luther King Day	Oct 14 Columbus Day (Most regions)
Feb 14 Valentine's Day	Oct 31 Halloween
Feb 18 Presidents' Day	Nov 11 Veterans Day
Mar 31 Easter Sunday	Nov 28 Thanksgiving Day
May 12 Mother's Day	Dec 24 Christmas Eve
May 27 Memorial Day	Dec 25 Christmas Day
Jun 16 Father's Day	Dec 31 New Year's Eve
Jul 4 Independence Day	

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA  
MAGISTRATE DIVISION

200 W. Front Street, Boise Idaho 83702

STATE OF IDAHO,  
Plaintiff.

vs.

Wade Allen Tomlinson  
2530 East Challis  
Meridian, ID 83646

Defendant.

Case No: CR-MD-2012-0014306

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that the above-entitled case is hereby set for:

Jury Trial....Tuesday, March 26, 2013....08:15 AM

Judge: John Hawley Jr.

I HEREBY CERTIFY that the foregoing is a true and correct copy of this Notice of Hearing entered by the court and on file in this office. I further certify that copies of this notice were served as follows:

Defendant: Mailed \_\_\_\_\_ Hand Delivered \_\_\_\_\_ Signature \_\_\_\_\_  
Clerk \_\_\_\_\_ Date \_\_\_\_\_ Phone ( ) \_\_\_\_\_

David J Smethers  
1000 S. Roosevelt Street  
Boise ID 83705

Private Counsel: Mailed X Hand Delivered \_\_\_\_\_ Signature \_\_\_\_\_  
Clerk csp Date 1/14/13 Phone ( ) \_\_\_\_\_

Prosecutor: Interdepartmental Mail X ☐ Ada ☒ Boise ☐ Eagle ☐ G.C. ☐ Meridian  
Clerk csp Date 1/14/13

Public Defender: Interdepartmental Mail \_\_\_\_\_  
Clerk \_\_\_\_\_ Date \_\_\_\_\_

Other: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Mailed \_\_\_\_\_ Hand Delivered \_\_\_\_\_ Signature \_\_\_\_\_  
Clerk \_\_\_\_\_ Date \_\_\_\_\_ Phone ( ) \_\_\_\_\_

Dated: 1/11/2013

CHRISTOPHER D. RICH  
Clerk of the Court

By:

Cassius S. Orsady  
Deputy Clerk

JAN 18 2013

CHRISTOPHER D. RICH, Clerk  
By KATRINA CHRISTENSEN  
DEPUTY

CARY B. COLAIANNI  
BOISE CITY ATTORNEY

Jared B. Stubbs  
Assistant City Attorney  
BOISE CITY ATTORNEY'S OFFICE  
P.O. Box 500  
Boise, Idaho 83701-0500  
Telephone: (208) 384-3870  
Idaho State Bar No. 7460

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE STATE OF IDAHO,	)	
	)	
Plaintiff,	)	Case No. CR-MD-2012-0014306
	)	
v.	)	
	)	
WADE ALLEN TOMLINSON,	)	<b>SUPPLEMENTAL RESPONSE TO</b>
	)	<b>REQUEST FOR DISCOVERY</b>
Defendant.	)	
	)	

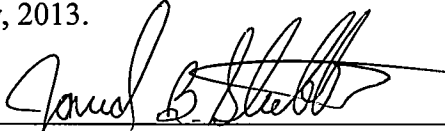
COMES NOW, the state of Idaho, by and through Jared B. Stubbs, Assistant City Attorney, and submits the following Supplemental Response to Request for Discovery:

The State has complied with such request by furnishing the following additional information, evidence, and/or materials:

**1. Disclosure:**

Alternative proposed Complaint to be filed the day of Jury Trial

DATED this 17 day of January, 2013.

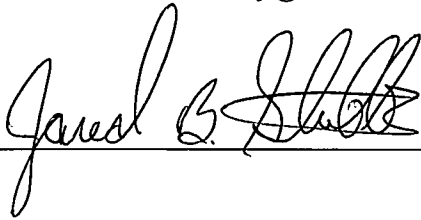
  
\_\_\_\_\_  
Jared B. Stubbs  
Assistant City Attorney

**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that on this 16 day of January, 2013, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

David J. Smethers  
Attorney at Law,  
1000 S. Roosevelt St.  
Boise, Idaho 83705

\_\_\_ US MAIL  
\_\_\_ INTERDEPARTMENT MAIL  
\_\_\_ FACSIMILE  
\_\_\_ HAND DELIVER  
☒ ELECTRONIC To: davidj@smetherslaw.com  
tracy@sallazlaw.com

  
\_\_\_\_\_

FEB 19 2013

CHRISTOPHER D. RICH, Clerk  
By MAURA OLSON  
DEPUTY

CARY B. COLAIANNI  
BOISE CITY ATTORNEY

Brenda M. Bauges  
Assistant City Attorney  
BOISE CITY ATTORNEY'S OFFICE  
P.O. Box 500  
Boise, Idaho 83701-0500  
Telephone: (208) 384-3870  
Idaho State Bar No. 8185

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO,	)	
	)	
Plaintiff,	)	Case No. CR-MD-2012-0014306
	)	
v.	)	
	)	<b>SUPPLEMENTAL RESPONSE TO</b>
WADE ALLEN TOMLINSON,	)	<b>REQUEST FOR DISCOVERY</b>
	)	
Defendant.	)	
_____	)	

COMES NOW, the state of Idaho, by and through Brenda M. Bauges, Assistant City Attorney, and submits the following Supplemental Response to Request for Discovery:

The State has complied with such request by furnishing the following additional information, evidence, and/or materials:

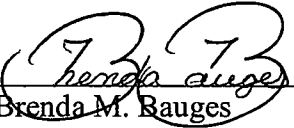
**1. Expert Witness:**

**Rachel Cutler or designee**, Idaho Bureau of Forensic Services, PO Box 700,  
Meridian, ID 83680, (208) 884-7170

**2. Disclosure:**

Curriculum Vitae - Rachel Cutler

DATED this 15 day of February, 2013.

  
Brenda M. Bauges  
Assistant City Attorney

**CERTIFICATE OF MAILING**

I **HEREBY CERTIFY** that on this 15 day of February, 2013, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

David J. Smethers  
Attorney at Law,  
1000 S. Roosevelt St.  
Boise, Idaho 83705

☐ US MAIL  
☐ INTERDEPARTMENT MAIL  
☐ FACSIMILE  
☐ HAND DELIVER

☒ **ELECTRONIC To:** davidj@smetherslaw.com  
tracy@sallazlaw.com





202  
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NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. \_\_\_\_\_

MAR - 4 2013

CHRISTOPHER D. RICH, Clerk  
By ELAINE TONG  
DEPUTY

CARY B. COLAIANNI  
BOISE CITY ATTORNEY

Brenda M. Bauges  
Assistant City Attorney  
BOISE CITY ATTORNEY'S OFFICE  
P.O. Box 500  
Boise, Idaho 83701-0500  
Telephone: (208) 384-3870  
Idaho State Bar No. 8185

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO, .	)	
	)	
Plaintiff,	)	Case No. CR-MD-2012-0014306
	)	
v.	)	
	)	<b>MOTION IN LIMINE</b>
WADE ALLEN TOMLINSON,	)	
	)	
Defendant.	)	
	)	

COMES NOW, the state of Idaho, by and through Brenda M. Bauges, Assistant City Attorney, and hereby moves this Court to exclude any evidence regarding the measurement of uncertainty for the LifeLoc FC20 device or regarding the rising of the Defendant's blood alcohol content (BAC). A memorandum in support of this motion is incorporated below.

**MEMORANDUM IN SUPPORT**

To the extent the Defendant seeks to introduce the follow types of evidence, the State moves in limine to exclude such evidence. The State moves to exclude any evidence or testimony, whether elicited by a defense or State witness, regarding the measurement of uncertainty or margin of error for the LifeLoc FC20 device. The State further moves to exclude any evidence or testimony, whether elicited by a defense or State witness, regarding the

possibility that the Defendant's blood alcohol content (BAC) was rising from the time the Defendant was driving to the time the Defendant provided a breath sample.

The measurement of uncertainty for the LifeLoc FC20 device and whether the Defendant's BAC was rising is irrelevant to whether there has been a per se violation of Idaho Code section 18-8004. The Idaho Supreme Court has recently held that in the per se context, "the actual alcohol concentration in the driver's blood is no longer the standard" and therefore a "testing machine's margin of error is irrelevant." *Elias-Cruz v. Idaho Dep't of Transp.*, 153 Idaho 200, \_\_\_, 280 P.3d 703, 708-09 (2012). A closer inspection into the Court's reasoning and the cases the Court relied upon in coming to this conclusion illustrate that though this appeal generated from an administrative license suspension hearing, it applies in the criminal context and also applies to rising BAC evidence.

The conclusion that the only question in a per se violation of Idaho Code section 18-8004 is whether or not the test results showed a concentration at or above the legal limit, was based in part on the Court's examination of the evolution of Idaho Code criminalizing driving under the influence (DUI) and criminal case law. *Id.* at 706-709. As pointed out by the Court, the legislature created only a presumption of intoxication in 1970 with its DUI law. *Id.* at 706. The Court then examined the implications of a presumption as opposed to a per se violation by citing a criminal case, not a license suspension case. *Id.* In that case, the question for the Court was whether the State needed to prove back-extrapolation for a breath test to be admissible in the criminal context, given the argument of rising BAC. *State v. Sutliff*, 97 Idaho 523, 524-25, 547 P.2d 1128, 1129-30 (1976). The Court held that the State did not. *Id.* The Court found that the test results "relate[] back to the time of the alleged offense for purposes of applying the statutory presumption." *Id.* at 525, 547 P.2d at 1130. A defendant could introduce evidence of back-extrapolation to argue rising BAC as the 1970 statute specifically provided for "the introduction of any other competent evidence bearing upon the question of whether or not the defendant was under the influence of intoxicating beverages." *Id.* (quoting then-Idaho Code section 49-1102(b)(4)). In this rebuttable presumption context, such evidence went to the weight of the test results, not their admissibility. *Id.* at 524, 547 P.2d at 1129. It is worthy of note that the Court found the defendant could introduce evidence of back-extrapolation where the statute specifically provided for "other competent evidence," and no such similar language appears in the post-1984 statute except in cases of refusal and where the test was unreliable or is

inadmissible. *See* Ch. 9, § 2, 1970 Idaho Sess. Laws 15, 16; Idaho Code §§ 18-8004(2) & 18-8004(4).

When the legislature enacted the 1984 DUI laws, however, it changed the significance of the tests results for BAC as they “no longer created merely a presumption of intoxication [but] . . . could be used to establish a per se violation of the statute.” *Elias-Cruz*, 153 Idaho at \_\_\_, 280 P.3d at 706. Post-1984, the State can prove a defendant was DUI by showing under the totality of the evidence that the defendant was DUI or establish that the defendant drove with an alcohol concentration at or above the legal limit. *Id.* When electing to proceed under the latter per se method, “the question is what the alcohol level was at the time the sample was taken.” *Id.* “[T]here no longer need[s] to be a determination of alcohol concentration in the blood to prove a per se violation. Such violation [can] be established simply by the test results.” *Id.* at 707. This shift in focus from actual alcohol concentration in the blood to simply what the test results show is further illustrated by the deletion of any reference to an evidentiary test being a “determination of the percent by weight of alcohol in blood.” *Id.* at 707. The Idaho Supreme Court summed up this shift in the criminal statute and case law in the following manner:

Thus, after the 1987 amendment, a per se violation of the statute no longer need be based upon showing “a determination of the percent by weight of alcohol concentration in blood.” . . .

After the 1987 amendment, a violation can be shown simply by the results of a test for alcohol concentration that complies with the statutory requirements. With that change, the margin of error in the testing equipment is irrelevant. The equipment need not precisely measure the alcohol concentration in the person’s blood. The test need only be based upon the correct formula, and the equipment must be properly approved and certified.

. . . . When the statute declared it a crime for a person to drive a motor vehicle with “alcohol in his blood” greater than a specified amount, we did not require the State to establish the precise amount of alcohol in the driver’s blood at the time of driving, even though we knew that the alcohol concentration in the driver’s blood at the time of driving could be lower than at the time of testing. In essence, we held that the driver took the risk that the concentration of alcohol in his blood at the time of testing would be greater than it was when he was actually driving an hour earlier. After the 1987 amendments, the standard is no longer the concentration of alcohol in the driver’s blood. It is simply the alcohol concentration shown by an approved and properly administered test of the driver’s breath, blood, or urine. Because the actual alcohol concentration in the driver’s blood is no longer the standard, the testing machine’s margin of error is irrelevant.

*Id.* at 707-09 (citations omitted, emphasis added).

Although the Court only explicitly states the margin of error is irrelevant, the logic applies to rising BAC evidence as well, especially as the Court cites rising BAC cases to come to its conclusion. This is true regardless of the Court quoting *State v. Robinett*, 141 Idaho 110, 106 P.3d 436 (2005), which quotes the *Sutliff* language that back-extrapolation goes to the weight not the admissibility of test results, because from the remainder of the Court's analysis it does not logically follow that this can still be the standard. If actual alcohol concentration in the driver's blood is no longer the standard, and it does not matter if the test results differ from what the actual blood alcohol content was at the time of driving as it is simply the test results that show a per se violation, it follows then that any discussion of back-extrapolation would be entirely irrelevant to whether or not the defendant's BAC tests showed a percentage of alcohol at or above the legal limit. Additionally, that language from *Sutliff* was based on the Court's determination that the statute at the time allowed for such "other competent evidence" and as stated above, no such language exists in the current statute except in circumstances not relevant to the case at hand.


Though *Elias-Cruz* is an appeal from an administrative license suspension hearing, the above analysis is entirely based in the criminal DUI statutes and criminal case law. The analysis is the Court's legal conclusion regarding whether evidence is relevant to the *crime* of DUI as charged in the criminal code. As such, it is a legal conclusion that does not depend upon the procedural posture of how the question came before the Court nor what the burden of proof is in an administrative license suspension hearing versus a criminal case. The cases the Court discusses are criminal cases, the burden of proof being the same as the burden of proof in the instant case. Legal conclusions of what would be relevant at trial in a criminal case apply regardless of whether the Court made that determination in an appeal from a trial, or an appeal from a different context.

WRONG:  
Burden in ALS  
is preponderance

Therefore, because irrelevant evidence is inadmissible—Idaho Rule of Evidence 402—and because *Elias-Cruz* holds that the only question post-1987 in a per se DUI case is whether valid test results show a BAC at or above the legal limit, the State requests this Court to exclude any evidence concerning the measurement of uncertainty or rising BAC.<sup>1</sup> As stated by the Court in *Elias-Cruz*, "There is no due process violation in excluding irrelevant evidence. There is no constitutional right to drive with alcohol in one's system."

<sup>1</sup> The Honorable Tom Watkins has previously partially ruled in the State's favor on this issue, his opinion is attached.

DATED this 1 day of <sup>March</sup>~~February~~, 2013.

  
Brenda M. Bauges  
Assistant City Attorney

**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that on this 1 day of <sup>March</sup>~~February~~, 2013, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

David J. Smethers  
Attorney at Law,  
1000 S. Roosevelt St.  
Boise, Idaho 83705

☒ US MAIL  
☐ INTERDEPARTMENT MAIL  
☐ FACSIMILE  
☐ HAND DELIVER

  
Brenda M. Bauges

OCT 01 2012

CHRISTOPHER D. RICH, Clerk  
By HEIDI BELL  
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,

Plaintiff,

Vs.

WENDY MYRICK,

Defendant.

CASE NO. CR-FE-2011-0020266

MEMORANDUM OPINION

ON MOTION IN LIMINE

INTRODUCTION

This matter came before the court on the state's motion in limine seeking to limit or exclude the testimony of a defense expert, in light of a recent decision from the Idaho Supreme Court. The court heard arguments from counsel and also received briefing on the issue, and the matter was taken under advisement.

### RELEVANT FACTS

Myrick is charged with DUI, a second violation of Idaho Code Section 18-8004, within a ten-year period. The complaint charges that Myrick drove "while under the influence of alcohol and/or drugs, or, in the alternative, did drive the above described motor vehicle at the above described location, with an alcohol concentration of .08 or more." Myrick has disclosed an expert witness, toxicologist Loring Beals, who will testify, in part, on the topics of the breath testing machine's margin of error, and well as how a person's blood-alcohol level can rise and fall over time.

On the morning of the scheduled trial, the state filed a motion in limine and supporting brief, asking the court to prohibit "the Defendant from calling any expert witnesses or eliciting any testimony from the State's witness regarding the possibility that the defendant's blood alcohol content (BAC) was rising from the time she was driving to the time she provided a breath sample. Further, the State seeks this Court's order to prohibit the Defendant from calling any expert witnesses or eliciting any testimony regarding the measurement of uncertainty or margin of error on the Intoxilyzer 5000." In support of this motion, the state cited Elias-Cruz v. Idaho Dept. of Transportation, 2012 Opinion No. 99, filed June 29, 2012.

### ANALYSIS

Elias-Cruz is an administrative license suspension case. There, Elias-Cruz was suspected of driving while under the influence of alcohol, while being under the age of 21. After admitting to consuming alcohol and going through the field sobriety testing, the Idaho State Police trooper administered a breath test to her using a Lifeloc FC20, which registered results of 0.021/0.020. Elias-Cruz filed a timely request for an administrative license suspension hearing, which was held on December 9<sup>th</sup>. At that hearing, rather than presenting evidence on one of the six

enumerated grounds under Idaho Code Section 18-8002A, she presented the testimony of an expert witness who testified regarding the margin of error of the testing equipment. Based upon that testimony, Elias-Cruz argued that any suspension must be based on her actual blood alcohol concentration rather than the alcohol concentration as shown by the test; that due to the testing equipment's margin of error, her actual blood alcohol content could have been below 0.02. The hearing officer rejected the argument and sustained her suspension.

On appeal, the district court reversed, ruling sua sponte that her due process rights were violated by the hearing officer's rejection of the equipment's margin of error and that she had a statutory right to present such evidence. The state appealed to the Idaho Supreme Court, which held that the district court had erred.

The court's analysis began by examining the history of Idaho's DUI laws. The court observed that in 1970 the legislature enacted a statute creating a presumption of intoxication if the driver's blood alcohol level exceeded the specified level. Under that statute, a lapse of time prior to the extraction of a breath sample could affect the weight of the evidence of the breath test, but not its admissibility. In 1984, the legislature enacted Idaho Code Section 18-8004, which changed the significance of test results for blood alcohol concentration. As the court explained, "[u]nder the new statute, the test results no longer created merely a presumption of intoxication. They could be used to establish a per se violation of the statute." At p. 4. With the new statute, a violation could be established in two ways; either by showing under the totality of the evidence that the driver was under the influence, or, by showing that the driver drove with an alcohol concentration of 0.08 or more. Where the prosecution elects to go forward only on the per se theory, the relevant inquiry is what the alcohol level was at the time the sample was taken. However, the court then cited State v. Robinett, 141 Idaho 110, 106 P.3d 436 (2005), which



reaffirmed the notion that the lapse of time prior to taking the breath test is still important, but bears only upon the weight, and not the admissibility of the test.

The final change to the DUI law came in 1987, whereby I.C. 18-8004 was amended so that there no longer needed to be a determination of alcohol concentration in the blood to prove a per se violation. Such a violation could be established simply by the test results. The court then discussed the importance of this amendment:

Thus, after the 1987 amendment, a per se violation of the statute no longer need be based upon showing "a determination of the percent by weight of alcohol concentration in blood." At the administrative hearing, Ms. Elias-Cruz argued that the test results did not accurately measure her 'actual blood alcohol content.' She stated, "In this case with regard to a blow of .02, her actual blood alcohol content could be as low as .015." With respect to the *McDaniel* [v. *State, Department of Transportation*, 149 Idaho 643, 239 P.2d 36 (Ct. App. 2010) where the court held that I.C. 18-8002A does not require the hearing officer to take into account any inherent error within the breath test machine before a license can be suspended] opinion, she argued, "the Decision should be based on an actual blood alcohol content rather than a printout from a machine that is subject to error, especially when the blood alcohol content is at a lower level where the margin of error is greater."

After the 1987 amendment, a violation can be shown simply by the results of a test for alcohol concentration that complies with the statutory requirements. With that change, the margin of error in the testing equipment is irrelevant. The equipment need not precisely measure the alcohol concentration in the person's blood. The test need only be based upon the correct formula, and the equipment must be properly approved and certified.

In 1993, the legislature enacted Idaho Code Section 18-8002A, creating the administrative license suspension under which Ms. Elias-Cruz's license was suspended in the case. Ch. 413, Section 2, 1993 Idaho Sess. Laws 1515, 1519-1523. The definition of "evidentiary test for alcohol concentration" in section 18-8002A is the same as the definition in Idaho Code Section 18-8004(4). I.C. Section 18-8002A(1)(e). Therefore, the margin of error of the testing equipment is also irrelevant in proceedings under section 18-8002A.

Elias-Cruz at 6-7.

The court's language is unequivocal. The margin of error in the breath testing machine is not relevant. And this applies not only in administrative hearings for the suspension of driver's

licenses, but applies in the criminal context of a DUI trial. The court in Elias-Cruz did not limit its holding to the administrative arena, although certainly it could have chosen to do so.

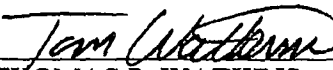
This court cannot admit irrelevant evidence. Testimony on the breath testing machine's margin of error, or its "measurement of uncertainty," as it is also called, would be inappropriate, and this court hereby orders that neither party may elicit testimony from any witness on this topic.

As to the second part of the state's motion, nothing in the Elias-Cruz opinion changes the state of the law in regards to the lapse of time before a breath test is given. The court cited with approval its holding in *Robinett* that a lapse of time could affect the weight the trier of fact gives to the breath test. In addition, the state has charged Myrick in the alternative; either that she was driving while under the influence, or while having an alcohol concentration of .08. Unlike proceeding on a per se theory, admission of Myrick's BAC test result for purposes of demonstrating impairment must be extrapolated back to the time of the alleged offense to be relevant. State v. Robinett, 141 Idaho at 113. Therefore, depending on the state's theory of the case, they may be required to extrapolate back Myrick's BAC to the time of driving, so any lapse of time could be quite significant to the trier of fact. The court therefore denies the state's motion limiting testimony as to any lapse in time between the driving and the time the sample was taken.

The court's decision in Elias-Cruz has certainly limited the areas in which expert testimony may be presented, but the holding does not go so far as to make the failure of an evidentiary test a criminal violation of the law. The decision only holds that so long as the breath testing instrument is properly approved and certified, and is operated by a certified

operator in accordance with proper procedures, its margin of error, or measure of uncertainty, is not relevant.

DATED This 30<sup>th</sup> day of September, 2012.

  
THOMAS P. WATKINS  
Magistrate Judge

202  
JT  
3/26  
8:15

NO. 1057  
FILED  
A.M. 10 P.M. 57

MAR 25 2013

CHRISTOPHER D. RICH, Clerk  
By MAURA OLSON  
DEPUTY

DAVID J. SMETHERS  
Attorney at Law  
1000 S. Roosevelt St.  
Boise, Idaho 83705  
208-336-1145  
FAX 208-336-1263

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT IN AND FOR  
THE COUNTY OF ADA

MD-12-14306

STATE OF IDAHO,

Plaintiff,

vs.

TOMLINSON, Wade,

Defendant

Case No.: ~~CR 2012-4306~~

SECOND MOTION TO CONTINUE  
JURY TRIAL

Comes now the defendant, by and through his attorney of record, and requests a  
continuance of the jury trial in this case for the following reasons:

- The previous jury trial was re-set as counsel was out of state on vacation.
- Counsel submitted a "highlighted" calendar of available dates with the last motion to  
continue. Counsel's calendar of available dates did not make it clear that the  
"highlighted" dates were the available dates versus the unavailable dates, and the current  
trial was set on unavailable date.
- On March 21, 2013, counsel left a voice mail phone message with the Boise City  
attorney that had signed a SUPPLEMENTAL RESONSE TO REQUEST FOR  
DISCOVERY filed in this case. The content of the voice mail message was that the  
defendant would be requesting a continuance, a formal motion to continue had

MD

inadvertently not been filed, the state could call off their witnesses, and a return phone call was requested.

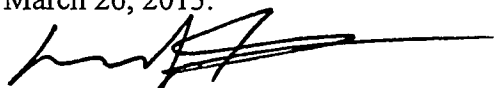
-Counsel did not receive a return call by March 25, 2013, counsel at that time contacted the prosecutor's office and was informed Ms. Brenda Bauges would be handling the case, and left a message on Ms. Bauges' voice mail, which was promptly returned.

-Counsel at that time informed Ms. Bauges that a continuance would be requested and from the defendant's perspective, the state need not have witnesses available.

-The defendant has heretofore waived his right to speedy trial.

-The state filed a MOTION IN LIMINE on March 1, 2013, that has not been heard by this Court. The state has not requested a hearing on this MOTION, and consequently, the defendant has not received notice of any hearing.

A hearing is requested on this MOTION TO CONTINUE at the hour of 8 AM on March 26, 2013.

  
David J. Smethers, Attorney at Law

3-25-13  
Date

#### CERTIFICATE OF SERVICE


I hereby certify that on the 25 day of March, 2013, a true and correct copy of the foregoing document was:

\_\_\_\_\_ Hand delivered ☒ Faxed \_\_\_\_\_ Mailed to the:

\_\_\_\_\_ Boise County Prosecutor

\_\_\_\_\_ Ada County Prosecutor

☒ Boise City Prosecutor

  
David J. Smethers

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHRISTOPHER D. RICH, Clerk  
By DEIRDRE FINNEGAN

STATE OF IDAHO,  
  
Plaintiff,  
  
vs. Wade Tomlinson  
  
Defendant.

**MAGISTRATE MINUTES / NOTICE OF HEARING**  
☒ **PRE-TRIAL MEMORANDUM**  
  
Case Number: CR-MD-12-14306  
  
Event Scheduled: \_\_\_\_\_  
  
Judge: Hawley Clerk: DF  
  
Case Called: \_\_\_\_\_ ☒ In Chambers  
  
☐ Interpreter: \_\_\_\_\_

☐ AC ☒ BC ☐ EA ☐ GC ☐ MC Bauges PD Private SMITH

Defendant: ☐ Present ☐ Not Present ☐ In Custody ☐ PD Appointed ☐ PD Denied ☐ Waived Attorney

☐ Defendant failed to appear. Bond forfeited/ROR revoked. Bench Warrant issued. Bond \$ \_\_\_\_\_

☐ Advised of Rights ☐ Not Guilty ☐ Guilty Plea / PV Admit ☐ Written Guilty Plea ☐ No Contact Order

☐ Bond \$ \_\_\_\_\_ ☐ Pre-Trial Release Order ☐ Provide \_\_\_\_\_ Evaluation

D\* not prepared for trial today, D\* requests continuance. State objects. Court grants. Court will entertain a motion for costs.  
State to file motion.  
Court + parties to be flexible w/ new trial date so ensure on day  
**NOTICE OF HEARING**

☐ Sentencing on \_\_\_\_\_ at \_\_\_\_\_ am/pm w/ Judge \_\_\_\_\_

☐ Court Trial Conference on \_\_\_\_\_ at \_\_\_\_\_ am/pm w/ Judge \_\_\_\_\_

☐ Pre-Trial / Jury Trial on \_\_\_\_\_ at \_\_\_\_\_ am/pm w/ Judge \_\_\_\_\_

☒ Jury Trial on April 17, 2013 at 8:15 am/pm w/ Judge Hawley

☐ Contact the Ada County Public Defender, 200 W. Front St., Rm. 1107, Boise, ID 83702, telephone (208)287-7400.

**You must appear as scheduled above. Failure to do so will result in a warrant being issued for your arrest, or default judgment may be entered if you are charged with an infraction.**  
**ADA COUNTY COURTHOUSE, 200 W. FRONT ST., BOISE, ID 83702**

I hereby certify that copies of this notice were served as follows:

Defendant: Hand Delivered ☐ Via Counsel ☒ Signature [Signature]

Defense Atty: Hand Delivered ☒

Prosecutor: Hand Delivered ☒

CHRISTOPHER D. RICH, Clerk of the District Court

By: [Signature]  
Deputy Clerk

[Signature]  
Magistrate Judge (for Pre-Trial Memorandum)  
DATED 3-26-13

202  
JT  
4/17  
8:15

NO. \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. \_\_\_\_\_ 2

**MAR 29 2013**

CHRISTOPHER D. RICH, Clerk  
By KATRINA CHRISTENSEN  
DEPUTY

CARY B. COLAIANNI  
BOISE CITY ATTORNEY

Brenda M. Bauges  
Assistant City Attorney  
BOISE CITY ATTORNEY'S OFFICE  
P.O. Box 500  
Boise, Idaho 83701-0500  
Telephone: (208) 384-3870  
Idaho State Bar No. 8185

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**


THE STATE OF IDAHO,	)	
	)	
Plaintiff,	)	Case No. CR-MD-2012-0014306
	)	
v.	)	
	)	
WADE ALLEN TOMLINSON,	)	<b>MOTION AND AFFIDAVIT</b>
	)	<b>OF COSTS</b>
Defendant.	)	
	)	

The State of Idaho, by and through its attorney of record, Brenda M. Bauges, Assistant City Attorney, hereby moves the Court for its Judgment and Order requiring Defendant to pay the cost of prosecution amounting to \$296.79. The basis is more fully described in the attached affidavit incorporated by this reference.

Ground for said motion is Defendant's failure to proceed on the date properly set and noticed for trial or hearing, while the State was ready to proceed with subpoenaed witnesses, whose appearance required actual expenditure of State funds.

The Order is sought without regard to the ultimate disposition of the criminal charges against Defendant and is authorized by Idaho Rules of Civil Procedure, Rule 54 and Idaho Code §19-2518.

DATED this 29 day of March, 2013.

  
\_\_\_\_\_  
Brenda M. Bauges  
Assistant City Attorney



CARY B. COLAIANNI  
BOISE CITY ATTORNEY

Brenda M. Bauges  
Assistant City Attorney  
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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE STATE OF IDAHO, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
WADE ALLEN TOMLINSON, )  
 )  
Defendant. )  
\_\_\_\_\_ )

Case No. CR-MD-2012-0014306

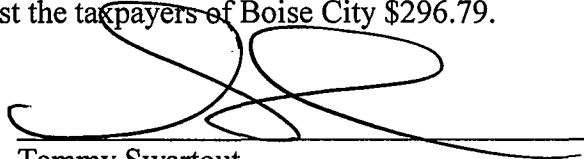
**AFFIDAVIT OF TAMMY SWARTOUT**

State of Idaho )  
 ) ss.  
County of Ada )

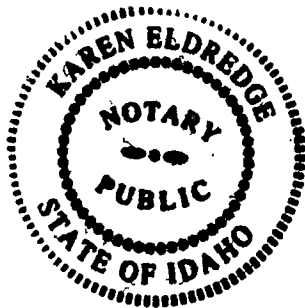
Tammy Swartout being first duly sworn on oath deposes and states:


1. I am an administrative officer at the Boise City Police Department and have personal knowledge of the compensation and terms of employment of its police officers under labor agreements in force at times pertinent to this statement.

2. When an officer of this department is subpoenaed to testify in court at times other than his/her regular duty hours, the City is obligated to pay him/her a minimum of three (3) hours overtime.
3. If the subpoena cancellation is within 48 hours before the subpoena time to appear, officers are entitled to three (3) hours of overtime. Officer David G. Frederick Ada #744's overtime rate on March 26, 2013, @ 8:15 a.m., was \$48.43 per hour. Officer Josiah C. Ransom Ada #797's overtime rate on March 26, 2013, @ 8:15 a.m., was \$50.50 per hour.
4. On March 26, 2013, Officer David G. Frederick Ada #744 and Officer Josiah C. Ransom Ada #797 was/were not scheduled to work, and was off duty at the time of the appearance herein.
5. His/Her/Their appearance at 8:15 a.m. on March 26, 2013, under subpoena of the court and city prosecutor, cost the taxpayers of Boise City \$296.79.

  
Tammy Swartout  
Boise Police Department

SUBSCRIBED AND SWORN TO Before me on this 27 day of March, 2013.



  
NOTARY PUBLIC FOR IDAHO  
Residing at Boise, Idaho  
My Commission Expires: 2.11.2014

APR 09 2013

CHRISTOPHER D. RICH, Clerk  
By DEIRDRE FINNEGAN  
DEPUTY

CARY B. COLAIANNI  
BOISE CITY ATTORNEY

Brenda M. Bauges  
Assistant City Attorney  
BOISE CITY ATTORNEY'S OFFICE  
P.O. Box 500  
Boise, Idaho 83701-0500  
Telephone: (208) 384-3870  
Idaho State Bar No. 8185

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE**

**STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE STATE OF IDAHO,	)	
	)	
Plaintiff,	)	Case No. CR-MD-2012-0014306
	)	
v.	)	
	)	<b>ORDER FOR REIMBURSEMENT</b>
WADE ALLEN TOMLINSON,	)	<b>OF COSTS OF PROSECUTION</b>
	)	
Defendant.	)	
	)	

The above-named Defendant having been duly notified of the trial or hearing set for March 26, 2013, where the State's witness, Officer David G. Frederick Ada #744 and Officer Josiah C. Ransom Ada #797, appeared pursuant to subpoena when said hearing was canceled at the request or cause of defendant;

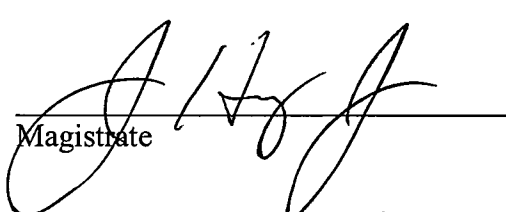
CC: BC, A<sup>o</sup>  
4/9/13  
DF

IT IS HEREBY ORDERED that Defendant reimburse the State through the Boise City Attorney's Office's restitution officer the following fees necessitated by Defendant's untimely cancellation of the above-mentioned trial or hearing:

Officer David G. Frederick Ada #744	\$ 145.29
Officer Josiah C. Ransom Ada #797	\$ 151.50

<b>Total Witness Fees</b>	<b>\$ 296.79</b>
---------------------------	------------------

DATED this 8<sup>th</sup> day of April, 2013.

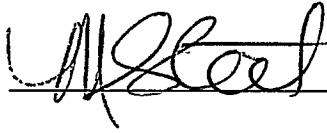
  
Magistrate

**CERTIFICATE OF MAILING**

I **HEREBY CERTIFY** that on this 29 day of March, 2013, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

David J. Smethers  
Attorney at Law,  
1000 S. Roosevelt St.  
Boise, Idaho 83705

☒ **US MAIL**  
☐ **INTERDEPARTMENTAL MAIL**  
☐ **FACSIMILE**  
☐ **HAND DELIVER**

  
\_\_\_\_\_

202  
ST  
4/17  
8:15

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 2:25

APR 11 2013

CHRISTOPHER D. RICH, Clerk  
By ELAINE TONG  
DEPUTY

DAVID J. SMETHERS  
Attorney at Law  
1000 S. Roosevelt St.  
Boise, Idaho 83705  
208-336-1145  
FAX 208-336-1263

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT IN AND FOR  
THE COUNTY OF ADA

STATE OF IDAHO,

Plaintiff,

vs.

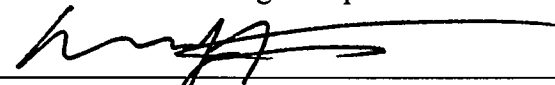
TOMLINSON, Wade,

Defendant

Case No.: CR 2012-<sup>14300</sup>~~4306~~

OBJECTION TO ORDER FOR  
REIMBURSEMENT OF COSTS OF  
PROSECUTION

The defendant objects to the ORDER and objects to the Court signing the  
ORDER for reasons that defendant has not been afforded a hearing on the state's  
MOTION. A hearing is requested.

  
David J. Smethers, Attorney at Law


4-10-13  
Date

CERTIFICATE OF SERVICE

I hereby certify that on the 10 day of April, 2013, a true and  
correct copy of the foregoing document was:

\_\_\_\_\_ Hand delivered ☒ Faxed \_\_\_\_\_ Mailed to the:

☒ Boise City Prosecutor

  
David J. Smethers

APR 15 2013

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHRISTOPHER D. RICH, Clerk  
BY DEIRDRE FINNEGAN  
DEPUTY

THE STATE OF IDAHO,	)	
	)	Case No. CR-MD-12-14306
Plaintiff,	)	
	)	
vs.	)	<b>ORDER AWARDING COSTS</b>
	)	<b>AGAINST DEFENDANT</b>
WADE TOMLINSON,	)	
	)	
Defendant.	)	

---

This matter is before the Court on the State's Motion and Affidavit of Costs filed March 29, 2013. On April 11, 2013 Defendant filed an objection to this order.

The history of this case is one of delays caused by the Defendant. Defendant was arrested September 26, 2012 for Driving Under the Influence, a misdemeanor in violation of Idaho Code section 18-8004. Attorney John DeFranco appeared and entered a not guilty plea for defendant October 1, 2012. The case was set for pretrial conference November 19 and Jury Trial December 13.

Pursuant to stipulation on October 19 David Smethers substituted in as counsel for Defendant. At the pretrial conference November 19 the case was scheduled for jury trial December 13. On December 13 the jury trial was vacated and reset for jury trial on February 12, 2013 at the defendant's request. The Pretrial Memorandum signed by the parties contained the following notation:

"Reset at D's [Defense Counsel's] request. D [Defendant] waives speedy & State does not object to continuance, but notes that all witnesses including expert were

available today for trial & [State] would like consideration in the future regarding continuances for unavailability.”

On January 7, 2013 Defendant filed a motion to vacate and reset the February 12 jury trial. On January 14 the Court mailed Notice to the State and defendant that the jury trial had been rescheduled to March 26, 2013. On March 25, the day before the jury trial Defendant filed a second motion to continue jury trial. Defense counsel asserts he attempted to call Boise City prosecutor Jared Stubbs on the afternoon of March 22. However, the most recent filing in this case indicates that Brenda Bauges was the handling attorney from Boise City. Ms. Bauges filed a Motion in Limine on March 1, 2013. Therefore, any contact with Mr. Stubbs was misguided.

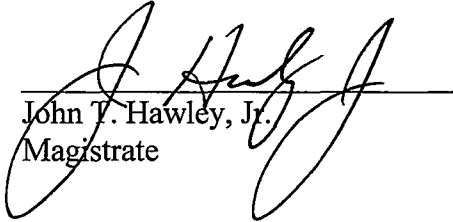
On March 26 Defense counsel appeared and informed the court that he was not prepared for trial and could not possibly proceed to trial due to a scheduling conflict. He requested a continuance. The State objected on the grounds that all of its witnesses had been subpoenaed and were prepared to testify. In a discussion in chambers the Court granted the continuance, but indicated it would be inclined to award costs to the State and would entertain a motion for costs. A jury trial was scheduled for April 17.

The Court voiced its displeasure with the continuance particularly because the March 26 jury trial had been scheduled on January 14. Defendant failed to timely seek a continuance. Thus the State was forced to incur costs of \$296.79 in witness fees solely due to Defendant's untimely cancellation of the jury trial which had been scheduled for more than two months.



On April 8 this Court signed an Order for reimbursement of Costs of Prosecution. Defendant's Objection is noted, but based on the record recited above it is hereby ORDERED and this does ORDER that Defendant shall reimburse the State \$296.79.

IT IS SO ORDERED. This 15<sup>th</sup> day of April, 2013.

  
\_\_\_\_\_  
John T. Hawley, Jr.  
Magistrate

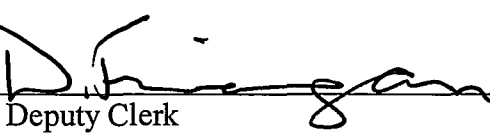
CLERK'S CERTIFICATE OF SERVICE

I, D. Finnegan, Deputy Clerk at Ada County Defendant Court, Magistrate Division, Fourth Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that I personally served or mailed, by United States mail, postage prepaid, one copy of the following document(s) to each of the parties or their Attorney of Record.

Brenda Bauges  
Deputy Boise City Prosecuting Attorney  
Boise, Id 83702  
(Interdepartmental Mail)

David Smethers  
Attorney at Law  
1000 S. Roosevelt St.  
Boise, ID 83705

CHRISTOPHER D. RICH  
Clerk of the District Court

By:   
Deputy Clerk

4/15/13

APR 17 2013

CHRISTOPHER D. RICH, Clerk  
By [Signature] Deputy

CARY B. COLAIANNI  
BOISE CITY ATTORNEY

Sarah A. Millar  
Assistant City Attorney  
BOISE CITY ATTORNEY'S OFFICE  
P.O. Box 500  
Boise, Idaho 83701-0500  
Telephone: (208) 384-3870  
Idaho State Bar No. 7439

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE STATE OF IDAHO,

Plaintiff,

v.

WADE ALLEN TOMLINSON,

Defendant.

Case No. CR-MD-2012-0014306

**COMPLAINT**

PERSONALLY APPEARED Before me this 17 day of April,  
2012, Brenda Bauges, Assistant City Attorney, in the city of Boise, county of  
Ada, state of Idaho, who, being first duly sworn, complains and says that Wade Allen  
Tomlinson, on or about the 26th day of September, 2012 in the city of Boise, county of Ada, and  
state of Idaho, did commit the crime(s) of: Count I: DRIVING UNDER THE INFLUENCE OF  
ALCOHOL AND/OR DRUGS, a misdemeanor, which is in violation of Idaho Code § 18-  
8004(1)(a); as follows, to-wit:

COUNT I

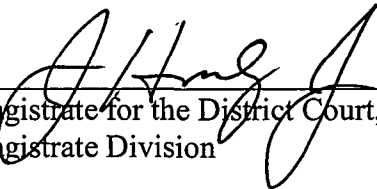
That the Defendant, Wade Allen Tomlinson, on or about the 26th day of September, 2012, in the city of Boise, county of Ada, state of Idaho, did unlawfully drive or be in actual physical control of a motor vehicle upon a highway, street or bridge, or upon public or private property open to the public, to-wit: 2007 gray Porsche Cayenne, at or about S. 10th St./W. Front St., with an alcohol concentration of .08 or more, as shown by analysis of blood, urine, or breath, which is in violation of Idaho Code § 18-8004(1)(a).

All of which is contrary to the form, force, and effect of the statute, and against the peace and dignity of the state of Idaho.

Said Complainant therefore prays that the Defendant may be dealt with according to law.

  
\_\_\_\_\_

SUBSCRIBED AND SWORN to before me this 17 day of April, 2012.

  
\_\_\_\_\_  
Magistrate for the District Court,  
Magistrate Division

<u>Time</u>	<u>Speaker</u>	<u>Note</u>
<u>9:56:23 AM</u>	Wade Tomlinson	MD-2012-14306
<u>9:56:32 AM</u>	-States Atty	Brenda Bauges
<u>9:56:35 AM</u>	- Personal Atty	David Smethers
<u>9:57:18 AM</u>		Parties argue- complaint not yet filed
<u>9:57:59 AM</u>	-States Atty- Brenda Bauges	files formal Complaint
<u>9:58:39 AM</u>	Judge Hawley	signs Complaint
<u>10:00:13 AM</u>	- Personal Atty-David Smethers	Argues no notice on motion in limine
<u>10:01:29 AM</u>	Judge Hawley	overrules any objection to motion in limine
<u>10:01:47 AM</u>	-States Atty- Brenda Bauges	notes for record court's notice of hearing on motion
<u>10:01:56 AM</u>	-States Atty- Brenda Bauges	Argues Motion in Limine- Exclusion of Evidence
<u>10:04:45 AM</u>	- Personal Atty-David Smethers	Argues against motion
<u>10:07:09 AM</u>	Judge Hawley	Defense is not prohibited to addressing accuracy of lifeloc reading
<u>10:07:58 AM</u>	Judge Hawley	will rule on objections during trial
<u>10:08:31 AM</u>	-States Atty- Brenda Bauges	Question on ruling
<u>10:08:48 AM</u>	Judge Hawley	ruling on motion deferred
<u>10:09:57 AM</u>	-States Atty- Brenda Bauges	argues case cited for per se case
<u>10:11:08 AM</u>	- Personal Atty-David Smethers	argument
<u>10:11:24 AM</u>	Judge Hawley	will determine foundation and relevance through trial
<u>10:12:23 AM</u>	-States Atty- Brenda Bauges	
<u>10:12:58 AM</u>	Judge Hawley	will not rule to limit defense at this time
<u>10:13:15 AM</u>	- Personal Atty-David Smethers	requests witness exclusion
<u>10:48:28 AM</u>		
<u>10:48:32 AM</u>	Jury Trial	Tomlinson MD 12-14306
<u>10:49:51 AM</u>		Jury panel enters
<u>10:51:30 AM</u>	Judge Hawley	Introduction
<u>10:51:52 AM</u>		Jury Roll Call
<u>10:53:22 AM</u>	Judge Hawley	Instructions to the Jury
<u>10:58:43 AM</u>		Jury panel Sworn
<u>10:59:18 AM</u>	Judge Hawley	Questions the Jury
<u>11:01:11 AM</u>	-States Atty- Brenda Bauges	list of witnesses
<u>11:01:32 AM</u>	- Personal Atty-David Smethers	list of witnesses

<u>11:02:14 AM</u>	-States Atty- Brenda Bauges	voir dire questioning
<u>11:13:01 AM</u>	- Personal Atty-David Smethers	Objection
<u>11:13:27 AM</u>	Judge Hawley	overruled
<u>11:14:29 AM</u>	- Personal Atty-David Smethers	Objection
<u>11:14:37 AM</u>	Judge Hawley	overruled
<u>11:15:28 AM</u>	-States Atty- Brenda Bauges	moves to strike juror #373 (4) for cause
<u>11:19:01 AM</u>	- Personal Atty-David Smethers	questions juror- objects to striking
<u>11:19:03 AM</u>	Judge Hawley	Juror #373 excused for cause
<u>11:21:46 AM</u>	- Personal Atty-David Smethers	requests sidebar
<u>11:22:09 AM</u>		Sidebar
<u>11:22:58 AM</u>	- Personal Atty-David Smethers	objection
<u>11:23:07 AM</u>	Judge Hawley	sustained
<u>11:23:24 AM</u>	-States Atty- Brenda Bauges	explains question
<u>11:23:31 AM</u>	Judge Hawley	rephrase
<u>11:32:19 AM</u>	- Personal Atty-David Smethers	voir dire questioning
<u>11:39:58 AM</u>	- Personal Atty-David Smethers	moves to strike juror #366 (2) for cause
<u>11:40:20 AM</u>	Judge Hawley	questions juror #366
<u>11:40:57 AM</u>	Judge Hawley	juror not excused for cause
<u>11:46:49 AM</u>		Peremptory challenges
<u>11:57:13 AM</u>		Final six jurors seated
<u>11:58:32 AM</u>		remaining jurors exit
<u>11:59:32 AM</u>	Judge Hawley	Instructions to the Jury
<u>11:59:51 AM</u>		Jury Sworn
<u>12:12:41 PM</u>	Judge Hawley	lunch recess
<u>12:13:18 PM</u>		Jury exits
<u>1:32:20 PM</u>		Jury enters
<u>1:32:43 PM</u>	-States Atty- Brenda Bauges	Opening Statement
<u>1:33:25 PM</u>	- Personal Atty-David Smethers	objection
<u>1:33:28 PM</u>	Judge Hawley	overruled
<u>1:34:06 PM</u>	- Personal Atty-David Smethers	Opening Statement
<u>1:37:48 PM</u>	-States Atty- Brenda Bauges	Calls SW #1- officer David Frederick- Sworn- Direct Examination of the Witness
<u>1:43:30 PM</u>	Witness	Identifies Defendant

<u>1:49:41 PM</u>	- Personal Atty-David Smethers	objection- relevance
<u>1:49:47 PM</u>	Judge Hawley	overruled
<u>1:49:51 PM</u>	-States Atty- Brenda Bauges	continues Direct Examination of the Witness
<u>1:52:32 PM</u>	- Personal Atty-David Smethers	takes a minute to examine state's exhibit #2
<u>1:53:48 PM</u>	-States Atty- Brenda Bauges	present exhibits !-3 to witness
<u>1:55:03 PM</u>	- Personal Atty-David Smethers	objection
<u>1:55:12 PM</u>	Judge Hawley	overruled
<u>1:55:32 PM</u>	- Personal Atty-David Smethers	objection
<u>1:55:36 PM</u>	- Personal Atty-David Smethers	question in aid of objection
<u>1:55:58 PM</u>	- Personal Atty-David Smethers	objection
<u>1:56:08 PM</u>	Judge Hawley	objection noted
<u>1:56:21 PM</u>	- Personal Atty-David Smethers	objection
<u>1:56:25 PM</u>	Judge Hawley	overruled
<u>1:56:31 PM</u>	-States Atty- Brenda Bauges	moves to admit exhibit #1
<u>1:56:35 PM</u>	- Personal Atty-David Smethers	no objection
<u>1:56:36 PM</u>	Judge Hawley	State's Exhibit #1 admitted
<u>1:58:44 PM</u>	- Personal Atty-David Smethers	objection
<u>1:58:48 PM</u>	Judge Hawley	sustained
<u>1:59:01 PM</u>	- Personal Atty-David Smethers	objection
<u>1:59:08 PM</u>	Judge Hawley	overruled
<u>1:59:27 PM</u>	- Personal Atty-David Smethers	objection- hearsay & foundation
<u>1:59:39 PM</u>	Judge Hawley	overruled
<u>1:59:43 PM</u>	-States Atty- Brenda Bauges	argues foundation
<u>1:59:53 PM</u>	Judge Hawley	more foundation required
<u>2:01:59 PM</u>	- Personal Atty-David Smethers	objection
<u>2:02:08 PM</u>	Judge Hawley	overruled
<u>2:02:32 PM</u>	- Personal Atty-David Smethers	objection
<u>2:02:39 PM</u>	Judge Hawley	overruled
<u>2:03:04 PM</u>	- Personal Atty-David Smethers	objection- legal conclusions

<u>2:03:22 PM</u>	-States Atty- Brenda Bauges	argument
<u>2:03:57 PM</u>	Judge Hawley	overruled
<u>2:04:04 PM</u>	-States Atty- Brenda Bauges	moves to admit exhibit #3
<u>2:04:06 PM</u>	- Personal Atty-David Smethers	
<u>2:04:07 PM</u>	Judge Hawley	State's exhibit #3 admitted
<u>2:04:41 PM</u>	- Personal Atty-David Smethers	objection
<u>2:04:47 PM</u>	Judge Hawley	requests more foundation
<u>2:05:45 PM</u>	- Personal Atty-David Smethers	objection
<u>2:05:49 PM</u>	Judge Hawley	overruled
<u>2:06:06 PM</u>	- Personal Atty-David Smethers	objection
<u>2:06:10 PM</u>	Judge Hawley	overruled
<u>2:07:12 PM</u>	-States Atty- Brenda Bauges	Moves to admit exhibit #2
<u>2:07:16 PM</u>	- Personal Atty-David Smethers	objection to admission of exhibit #2
<u>2:08:20 PM</u>	- Personal Atty-David Smethers	objection- not disclosed in discovery
<u>2:08:33 PM</u>	-States Atty- Brenda Bauges	Argues State did disclose this
<u>2:09:23 PM</u>	Judge Hawley	overrules objection
<u>2:09:27 PM</u>	Judge Hawley	State's exhibit #2 admitted
<u>2:12:18 PM</u>	-States Atty- Brenda Bauges	presents exhibit #4 to witness
<u>2:15:23 PM</u>	-States Atty- Brenda Bauges	moves to admit
<u>2:15:30 PM</u>	- Personal Atty-David Smethers	objection
<u>2:15:44 PM</u>	-States Atty- Brenda Bauges	argument
<u>2:15:55 PM</u>	Judge Hawley	overruled
<u>2:16:03 PM</u>	Judge Hawley	State's exhibit #4 admitted
<u>2:17:02 PM</u>	- Personal Atty-David Smethers	objection
<u>2:17:04 PM</u>	Judge Hawley	overruled
<u>2:17:22 PM</u>	- Personal Atty-David Smethers	objection
<u>2:17:26 PM</u>	Judge Hawley	sustained
<u>2:19:41 PM</u>	- Personal Atty-David Smethers	objection
<u>2:19:50 PM</u>	Judge Hawley	overruled



<u>2:21:02 PM</u>	- Personal Atty-David Smethers	Cross Examination of the Witness
<u>2:28:49 PM</u>	- Personal Atty-David Smethers	presents witness with his police report to refresh his memory
<u>2:30:12 PM</u>		witness given state's exhibit #4
<u>2:31:49 PM</u>	-States Atty- Brenda Bauges	objection-
<u>2:31:56 PM</u>	Judge Hawley	sustained
<u>2:32:07 PM</u>		sidebar
<u>2:32:27 PM</u>	Judge Hawley	evidentiary question to be taken up outside of jury's presence
<u>2:32:41 PM</u>		Jury exits
<u>2:33:31 PM</u>	- Personal Atty-David Smethers	Argues line of questioning- FSTs
<u>2:35:56 PM</u>	-States Atty- Brenda Bauges	argument
<u>2:38:46 PM</u>	- Personal Atty-David Smethers	argument
<u>2:39:11 PM</u>	Judge Hawley	state's object to questions about FSTs sustained
<u>2:40:15 PM</u>	Judge Hawley	Evidence excluded
<u>2:42:43 PM</u>		Jury enters
<u>2:43:03 PM</u>	- Personal Atty-David Smethers	continues Cross Examination of the Witness
<u>2:44:41 PM</u>	-States Atty- Brenda Bauges	objection
<u>2:44:46 PM</u>	Judge Hawley	overruled
<u>2:53:16 PM</u>	-States Atty- Brenda Bauges	objection
<u>2:53:24 PM</u>	Judge Hawley	take up outside presence of jury
<u>2:53:34 PM</u>		Jury exits
<u>2:54:05 PM</u>	-States Atty- Brenda Bauges	argues objection
<u>2:55:59 PM</u>	- Personal Atty-David Smethers	argument
<u>2:57:04 PM</u>	-States Atty- Brenda Bauges	argument
<u>2:57:53 PM</u>	- Personal Atty-David Smethers	argument
<u>2:58:18 PM</u>	Judge Hawley	witness does not qualify as expert for level changes in alcohol content
<u>3:02:14 PM</u>	- Personal Atty-David Smethers	argues relevance is BAC when Defendant driving- for the record
<u>3:04:05 PM</u>		Jury enters
<u>3:04:25 PM</u>	- Personal Atty-David Smethers	continues Cross Examination of the Witness

<u>3:09:40 PM</u>	-States Atty- Brenda Bauges	objection
<u>3:09:50 PM</u>	Judge Hawley	sustained
<u>3:10:34 PM</u>	-States Atty- Brenda Bauges	objection
<u>3:10:40 PM</u>		sidebar
<u>3:13:39 PM</u>	- Personal Atty-David Smethers	continues Cross Examination of the Witness
<u>3:14:15 PM</u>		Nothing further, witness steps down
<u>3:14:20 PM</u>	- Personal Atty-David Smethers	request witness remain available
<u>3:14:36 PM</u>	-States Atty- Brenda Bauges	State rests
<u>3:14:45 PM</u>	Judge Hawley	recess
<u>3:14:51 PM</u>		Jury exits
<u>3:42:26 PM</u>	- Personal Atty-David Smethers	moves to dismiss per rule 29
<u>3:42:37 PM</u>	-States Atty- Brenda Bauges	response
<u>3:43:43 PM</u>	Judge Hawley	case continues- motion denied
<u>3:45:33 PM</u>		Jury enters
<u>3:45:56 PM</u>	- Personal Atty-David Smethers	Calls DW #1- Wade Tomlinson-Sworn- Direct Examination of the Witness
<u>3:52:43 PM</u>	- Personal Atty-David Smethers	presents exhibit A to witness
<u>3:52:45 PM</u>	-States Atty- Brenda Bauges	objection to exhibit
<u>3:53:27 PM</u>	- Personal Atty-David Smethers	continues Direct Examination of the Witness
<u>3:53:59 PM</u>	- Personal Atty-David Smethers	moves to admit exhibit A for illustrative purposes
<u>3:54:33 PM</u>	-States Atty- Brenda Bauges	argues objection
<u>3:54:36 PM</u>	Judge Hawley	Defense exhibit A admitted
<u>3:55:27 PM</u>	- Personal Atty-David Smethers	objection
<u>3:55:35 PM</u>	Judge Hawley	overruled
<u>3:55:43 PM</u>	-States Atty- Brenda Bauges	Cross Examination of the Witness
<u>3:56:22 PM</u>	- Personal Atty-David Smethers	objection to last question by state
<u>3:56:42 PM</u>	Judge Hawley	overruled
<u>3:56:57 PM</u>		Nothing further, witness steps down
<u>3:57:20 PM</u>	Judge Hawley	recess
<u>3:57:25 PM</u>		Jury exits

<u>3:58:02 PM</u>	-States Atty- Brenda Bauges	comments on post proof instructions
<u>3:59:24 PM</u>	Judge Hawley	will look to see if there is a specific per se instruction
<u>4:11:55 PM</u>	-States Atty- Brenda Bauges	recap on in chambers discussion
<u>4:12:25 PM</u>	-States Atty- Brenda Bauges	requests order from court on what argument is permissible
<u>4:13:51 PM</u>	- Personal Atty-David Smethers	argument
<u>4:14:19 PM</u>	-States Atty- Brenda Bauges	further argument
<u>4:15:21 PM</u>	Judge Hawley	defense may argue about validity of lifeloc- cannot extrapolate back
<u>4:18:46 PM</u>		Jury enters
<u>4:19:10 PM</u>	Judge Hawley	Instructions to the Jury
<u>4:26:04 PM</u>	-States Atty- Brenda Bauges	Closing Argument
<u>4:33:29 PM</u>	- Personal Atty-David Smethers	Closing Argument
<u>4:47:33 PM</u>	-States Atty- Brenda Bauges	Rebuttal Argument
<u>4:51:59 PM</u>	- Personal Atty-David Smethers	objection- argument facts not in evidence
<u>4:52:16 PM</u>	Judge Hawley	sustained
<u>4:53:59 PM</u>	- Personal Atty-David Smethers	objection- moves to strike
<u>4:54:15 PM</u>	Judge Hawley	overrule
<u>4:59:31 PM</u>		Bailiff Sworn
<u>5:00:03 PM</u>		Jury exits to deliberate
<u>7:50:31 PM</u>		Jury enters
<u>7:51:01 PM</u>		Verdict-Guilty
<u>7:52:12 PM</u>		Jury exits

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA  
MAGISTRATE DIVISION

200 W. Front Street, Boise Idaho 83702

STATE OF IDAHO,  
Plaintiff.

vs.

Wade Allen Tomlinson  
2530 East Challis  
Meridian, ID 83646

Defendant.

Case No: CR-MD-2012-0014306

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that the above-entitled case is hereby set for:

Sentencing....Monday, May 13, 2013....01:30 PM

Judge: John Hawley Jr.

I HEREBY CERTIFY that the foregoing is a true and correct copy of this Notice of Hearing entered by the court and on file in this office. I further certify that copies of this notice were served as follows:

Defendant: Mailed \_\_\_\_\_ Hand Delivered ☒  
Clerk DF Date 4/17/13

Signature Wade A. Tomlinson  
Phone ( )

David J Smethers  
1000 S. Roosevelt Street  
Boise ID 83705

Private Counsel: Mailed ☒  
Clerk DF Date 4/22/13

Signature \_\_\_\_\_  
Phone ( )

Prosecutor: Interdepartmental Mail ☒ Ada ☒ Boise ☐ Eagle ☐ G.C. ☐ Meridian  
Clerk DF Date 4/22/13

Public Defender: Interdepartmental Mail \_\_\_\_\_  
Clerk \_\_\_\_\_ Date \_\_\_\_\_

Other: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Mailed \_\_\_\_\_ Hand Delivered \_\_\_\_\_  
Clerk \_\_\_\_\_ Date \_\_\_\_\_

Signature \_\_\_\_\_  
Phone ( )

Dated: 4/17/2013

CHRISTOPHER D. RICH  
Clerk of the Court

By: Carina S. Presley  
Deputy Clerk

Cite Pay Website: <https://www.citepayusa.com/payments> Supreme Court Repository: <https://www.idcourts.us>

APR 17 2013

CHRISTOPHER D. RICH, Clerk  
By DEIRDRE FINNEGAN  
DEPUTY

**VERDICT**

STATE OF IDAHO )  
 )  
Plaintiff )  
 )  
vs. )  
 )  
Wade Tomlinson )  
 )  
Defendant )  
\_\_\_\_\_ )

CASE No. CR-MD-2012-14306

We, the Jury, unanimously find the defendant Wade Tomlinson

\_\_\_\_ Not Guilty  
X Guilty

of the crime of Driving Under the Influence, Idaho Code 18-8004.

Dated this 17<sup>th</sup> day of April, 2013.

*Deirdre A. Finnegan*  
Presiding Juror

ku

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT**

**IN AND FOR THE COUNTY OF ADA, STATE OF IDAHO**

**MAGISTRATE DIVISION**

STATE OF IDAHO

Plaintiff,

vs.

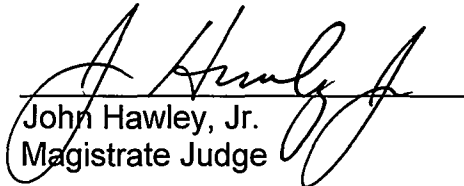
**Wade Tomlinson**

Defendant.

CASE NUMBER: MD-2012-14306

JURY INSTRUCTIONS

Submitted to the jury this 17<sup>th</sup> day of April, 2013.

  
John Hawley, Jr.  
Magistrate Judge

NO. \_\_\_\_\_  
FILED \_\_\_\_\_  
P.M. \_\_\_\_\_

**APR 17 2013**

CHRISTOPHER D. RICH, Clerk  
By KELLE WEGENER  
DEPUTY

## INSTRUCTION NUMBER 1

In a moment the Clerk will call the roll of the jury. When your name is called you will also be identified with a number. Please remember your number as we will be using it later in the jury selection process. Please answer out loud.

The Clerk will now call the roll of the jury.

Ladies and Gentlemen, you have been summoned as prospective jurors in the lawsuit now before us. The first thing we do in a trial is to select 6 jurors from among you.

I am Judge John Hawley, the judge in charge of the courtroom and this trial. The deputy clerk of court is Deirdre Finnegan, she will mark the trial exhibits and administer oaths to you jurors and to the witnesses. Bailiff Hank Ortiz will supervise the jury and assist in keeping things running smoothly.

Each of you is qualified to serve as a juror of this court. This call upon your time does not frequently come to you, but is part of your obligation for your citizenship in this state and country. No one should avoid fulfilling this obligation except under the most pressing circumstances. Service on a jury is a civic and patriotic obligation, which all good citizens should perform.

Service on a jury affords you an opportunity to be a part of the judicial process, by which the legal affairs and liberties of your fellow men and women are determined and protected under our form of government. You are being asked to perform one of the highest duties of citizenship, that is, to sit in judgment on facts, which will determine the guilt or innocence of persons charged with a crime.

To assist you with the process of selection of a jury, I will introduce you to the parties and their lawyers and tell you in summary what this action is about. When I introduce an individual would you please identify yourself for the jury panel.

The state of Idaho is the plaintiff in this action. The lawyer representing the state is Brenda Bauges, on behalf of the Boise City Attorney's Office.

The defendant in this action is **Wade Tomlinson**. The defendant Wade Tomlinson is represented by David Smethers. I will now read you the pertinent portion of the complaint which sets forth the claim against the defendant. The complaint is not to be considered as evidence but is a mere formal charge against the defendant. You must not consider it as evidence of his guilt and you must not be influenced by the fact that a charge has been filed.

With regard to Wade Tomlinson, the complaint charges that he, on or about the 26<sup>th</sup> day of September, 2012 did commit the crime of Driving Under the Influence of Alcohol this being a violation of Idaho Code Section 18-8004. To this charge a plea of not guilty has been entered.

*The initial 14 jurors have been randomly selected by the Jury Commission and are properly seated in the jury box.*

In this part of the jury selection, you will be asked questions touching on your qualifications to serve as jurors in this particular case. This part of the case is known as the voir dire examination.

Voir dire examination is for the purpose of determining if your decision in this case would in any way be influenced by opinions which you now hold or by some personal experience or special knowledge which you may have concerning the subject matter to be tried. The object is to obtain six persons who will impartially try the issues of this case upon the evidence presented in this courtroom without being influenced by any other factors.

Please understand that this questioning is not for the purpose of prying into your affairs for personal reasons but is only for the purpose of obtaining an impartial jury.



Each question has an important bearing upon your qualifications as a juror and each question is based upon a requirement of the law with respect to such qualifications. Each question is asked each of you, as though each of you were being questioned separately.

If your answer to any question is yes, please raise your hand. You will then be asked to identify yourself by both your name and juror number.

At this time I would instruct both sides to avoid repeating any question during this voir dire process which has already been asked. I would ask counsel to note, however, that you certainly have the right to ask follow-up questions of any individual juror based upon that juror's response to any previous question.

The jury should be aware that during and following the voir dire examination one or more of you may be challenged.

Each side has a certain number of "peremptory challenges", by which I mean each side can challenge a juror and ask that he or she be excused without giving a reason therefore. In addition each side has challenges "for cause", by which I mean that each side can ask that a juror be excused for a specific reason. If you are excused by either side please do not feel offended or feel that your honesty or integrity is being questioned. It is not.

The clerk will now swear in the entire jury panel for the voir dire examination.

## **INSTRUCTION NUMBER 2**

During the course of this trial you are instructed that you are not to discuss this case among yourselves or with anyone else, nor to form an opinion as to the merits of the case until after the case has been submitted to you for your determination.

### **INSTRUCTION NUMBER 3**

Now that you have been sworn as jurors to try this case, I want to go over with you what will be happening. I will describe how the trial will be conducted and what we will be doing. At the end of the trial I will give you more detailed guidance on how you are to reach your decision.

Because the state has the burden of proof, it goes first. The state will begin by making an opening statement of the case. After the state's opening statement, the defense may make an opening statement, or may wait until the state has presented its case.

The state will offer evidence that it says will support the charge(s) against the defendant. The defense may then present evidence, but is not required to do so. If the defense does present evidence, the state may then present rebuttal evidence. This is evidence offered to answer the defense's evidence.

After you have heard all the evidence, I will give you additional instructions on the law. After you have heard the instructions, the state and the defense will each be given time for closing arguments. In their closing arguments, they will summarize the evidence to help you understand how it relates to the law. Just as the opening statements are not evidence, neither are the closing arguments. After the closing arguments, you will leave the courtroom together to make your decision. During your deliberations, you will have with you my instructions, the exhibits admitted into evidence and any notes taken by you in court.

## **INSTRUCTION NUMBER 4**

Under our law and system of justice, the defendant is presumed to be innocent. The presumption of innocence means two things.

First, the state has the burden of proving the defendant guilty. The state has that burden throughout the trial. The defendant is never required to prove his innocence, nor does he ever have to produce any evidence at all.

Second, the state must prove the alleged crime beyond a reasonable doubt. A reasonable doubt is not a mere possible or imaginary doubt. It is a doubt based on reason and common sense. It may arise from a careful and impartial consideration of all the evidence, or from lack of evidence. If after considering all the evidence you have a reasonable doubt about the defendant's guilt, you must find the defendant not guilty.

## **INSTRUCTION NUMBER 5**

Your duties are to determine the facts, to apply the law set forth in my instructions to those facts, and in this way to decide the case. In so doing, you must follow my instructions regardless of your own opinion of what the law is or should be, or what either side may state the law to be. You must consider the instructions as a whole, not picking out one and disregarding others. The order in which the instructions are given has no significance as to their relative importance. The law requires that your decision be made solely upon the evidence before you. Neither sympathy nor prejudice should influence you in your deliberations. Faithful performance by you of these duties is vital to the administration of justice.

In determining the facts, you may consider only the evidence admitted in this trial. This evidence consists of the testimony of the witnesses, the exhibits offered and received, and any stipulated or admitted facts. The production of evidence in court is governed by rules of law. At times during the trial, an objection may be made to a question asked a witness, or to a witness' answer, or to an exhibit. This simply means that I am being asked to decide a particular rule of law. Arguments on the admissibility of evidence are designed to aid the Court and are not to be considered by you nor affect your deliberations. If I sustain an objection to a question or to an exhibit, the witness may not answer the question or the exhibit may not be considered. Do not attempt to guess what the answer might have been or what the exhibit might have shown. Also, if I tell you not to consider a particular statement or exhibit you should put it out of your mind, and not refer to it or rely on it in your later deliberations.

During the trial I may have to talk with the parties about the rules of law which should apply in this case. Sometimes we will talk here at the bench. At other times I will excuse you from the courtroom so that you can be comfortable while we work out any problems. You are not to speculate about any such discussions. They are necessary from time to time and help the trial run more smoothly.

Some of you have probably heard the terms “circumstantial evidence,” “direct evidence” and “hearsay evidence.” Do not be concerned with these terms. You are to consider all the evidence admitted in this trial.

However, the law does not require you to believe all the evidence. As the sole judges of the facts, you must determine what evidence you believe and what weight you attach to it.

There is no magical formula by which one may evaluate testimony. You bring with you to this courtroom all of the experience and background of your lives. In your everyday affairs you determine for yourselves whom you believe, what you believe, and how much weight you attach to what you are told. The same considerations that you use in your everyday dealings in making these decisions are the considerations which you should apply in your deliberations.

In deciding what you believe, do not make your decision simply because more witnesses may have testified one way than the other. Your job is to think about the testimony of each witness you heard and decide how much you believe of what he or she had to say.

A witness who has special knowledge in a particular matter may give his or her opinion on that matter. In determining the weight to be given such opinion, you should consider the qualifications and credibility of the witness and the reasons given for his or her opinion. You are not bound by such opinion. Give it the weight, if any, to which you deem it entitled.

## **INSTRUCTION NUMBER 6**

If during the trial I may say or do anything which suggests to you that I am inclined to favor the claims or position of any party, you will not permit yourself to be influenced by any such suggestion. I will not express nor intend to express, nor will I intend to intimate, any opinion as to which witnesses are or are not worthy of belief; what facts are or are not established; or what inferences should be drawn from the evidence. If any expression of mine seems to indicate an opinion relating to any of these matters, I instruct you to disregard it.

**INSTRUCTION NUMBER 7**

Do not concern yourself with the subject of penalty or punishment. That subject must not in any way affect your verdict. If you find the defendant guilty, it will be my duty to determine the appropriate penalty or punishment.



## **INSTRUCTION NUMBER 8**

If you wish, you may take notes to help you remember what witnesses said. If you do take notes, please keep them to yourself until you and your fellow jurors go to the jury room to decide the case. You should not let note-taking distract you so that you do not hear other answers by witnesses. When you leave at night, please leave your notes in the jury room.

If you do not take notes, you should rely on your own memory of what was said and not be overly influenced by the notes of other jurors. In addition, you cannot assign to one person the duty of taking notes for all of you.

## **INSTRUCTION NUMBER 9**

It is important that as jurors and officers of this court you obey the following instructions at any time you leave the jury box, whether it be for recesses of the court during the day or when you leave the courtroom to go home at night.

Do not discuss this case during the trial with anyone, including any of the attorneys, parties, witnesses, your friends, or members of your family. "No discussion" also means no emailing, text messaging, tweeting, blogging, posting to electronic bulletin boards, and any other form of communication, electronic or otherwise.

Do not discuss this case with other jurors until you begin your deliberations at the end of the trial. Do not attempt to decide the case until you begin your deliberations.

I will give you some form of this instruction every time we take a break. I do that not to insult you or because I don't think you are paying attention, but because experience has shown this is one of the hardest instructions for jurors to follow. I know of no other situation in our culture where we ask strangers to sit together watching and listening to something, then go into a little room together and not talk about the one thing they have in common: what they just watched together.

There are at least two reasons for this rule. The first is to help you keep an open mind. When you talk about things, you start to make decisions about them and it is extremely important that you not make any decisions about this case until you have heard all the evidence and all the rules for making your decisions, and you won't have that until the very end of the trial. The second

reason for the rule is that we want all of you working together on this decision when you deliberate. If you have conversations in groups of two or three during the trial, you won't remember to repeat all of your thoughts and observations for the rest of your fellow jurors when you deliberate at the end of the trial.

Ignore any attempted improper communication. If any person tries to talk to you about this case, tell that person that you cannot discuss the case because you are a juror. If that person persists, simply walk away and report the incident to the bailiff.

**Do not** make any independent personal investigations into any facts or locations connected with this case. **Do not** look up any information from any source, including the Internet. **Do not** communicate any private or special knowledge about any of the facts of this case to your fellow jurors. **Do not** read or listen to any news reports about this case or about anyone involved in this case, whether those reports are in newspapers or the Internet, or on radio or television.

In our daily lives we may be used to looking for information on-line and to "Google" something as a matter of routine. Also, in a trial it can be very tempting for jurors to do their own research to make sure they are making the correct decision. You must resist that temptation for our system of justice to work as it should. I specifically instruct that you must decide the case only on the evidence received here in court. If you communicate with anyone about the case or do outside research during the trial it could cause us to have to start the trial over with new jurors and you could be held in contempt of court.

While you are actually deliberating in the jury room, the bailiff will collect all cell phones and other means of electronic communications. Should you need to communicate with me or anyone else during the deliberations, please notify the bailiff.

**INSTRUCTION NO. 10**

You have now heard all the evidence in the case. My duty is to instruct you as to the law.

You must follow all the rules as I explain them to you. You may not follow some and ignore others. Even if you disagree or don't understand the reasons for some of the rules, you are bound to follow them. If anyone states a rule of law different from any I tell you, it is my instruction that you must follow.

INSTRUCTION NO. 11

As members of the jury it is your duty to decide what the facts are and to apply those facts to the law that I have given you. You are to decide the facts from all the evidence presented in the case.

The evidence you are to consider consists of:

1. sworn testimony of witnesses;
2. exhibits which have been admitted into evidence; and
3. any facts to which the parties have stipulated.

Certain things you have heard or seen are not evidence, including:

1. arguments and statements by lawyers. The lawyers are not witnesses. What they say in their opening statements, closing arguments and at other times is included to help you interpret the evidence, but is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, follow your memory;
2. testimony that has been excluded or stricken, or which you have been instructed to disregard;
3. anything you may have seen or heard when the court was not in session.

INSTRUCTION NO. 12

In order for the defendant to be found guilty of Driving Under the Influence the state must prove each of the following:

1. On or about September 26, 2012
2. in the state of Idaho
3. the defendant, Wade Tomlinson, drove
4. a motor vehicle
5. upon a highway, street or bridge or upon public or private property  
open to the public
6. while having an alcohol concentration of 0.08 or more as shown by  
analysis of the defendant's breath.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

INSTRUCTION NO. 13

I have outlined for you the rules of law applicable to this case and have told you of some of the matters which you may consider in weighing the evidence to determine the facts. In a few minutes counsel will present their closing remarks to you, and then you will retire to the jury room for your deliberations.

The attitude and conduct of jurors at the beginning of your deliberations are important. It is rarely productive at the outset for you to make an emphatic expression of your opinion on the case or to state how you intend to vote. When you do that at the beginning, your sense of pride may be aroused, and you may hesitate to change your position even if shown that it is wrong. Remember that you are not partisans or advocates, but are judges. For you, as for me, there can be no triumph except in the ascertainment and declaration of the truth.

As jurors you have a duty to consult with one another and to deliberate before making your individual decisions. You may fully and fairly discuss among yourselves all of the evidence you have seen and heard in this courtroom about this case, together with the law that relates to this case as contained in these instructions.

During your deliberations, you each have a right to re-examine your own views and change your opinion. You should only do so if you are convinced by fair and honest discussion that your original opinion was incorrect based upon the evidence the jury saw and heard during the trial and the law as given you in these instructions.

Consult with one another. Consider each other's views, and deliberate with the objective of reaching an agreement, if you can do so without disturbing your individual judgment. Each of you must decide this case for yourself; but you should do so only after a discussion and consideration of the case with your fellow jurors.

However, none of you should surrender your honest opinion as to the weight or effect of evidence or as to the innocence or guilt of the defendant because the majority of the jury feels otherwise or for the purpose of returning a unanimous verdict.



INSTRUCTION NO. 14

The original instructions and the exhibits will be with you in the jury room. They are part of the official court record. For this reason please do not alter them or mark on them in any way.

The instructions are numbered for convenience in referring to specific instructions. There may or may not be a gap in the numbering of the instructions. If there is, you should not concern yourselves about such gap.

**INSTRUCTION NO. 15**

You have been instructed as to all the rules of law that may be necessary for you to reach a verdict. Whether some of the instructions apply will depend upon your determination of the facts. You will disregard any instruction which applies to a state of facts which you determine does not exist. You must not conclude from the fact that an instruction has been given that the Court is expressing any opinion as to the facts.

INSTRUCTION NO. 16

Upon retiring to the jury room, select one of you as a presiding juror, who will preside over your deliberations. It is that person's duty to see that discussion is orderly; that the issues submitted for your decision are fully and fairly discussed; and that every juror has a chance to express him or herself upon each question.

In this case, your verdict must be unanimous. When you all arrive at a verdict, the presiding juror will sign it and you will return it into open court.

Your verdict in this case cannot be arrived at by chance, by lot, or by compromise.

If, after considering all of the instructions in their entirety, and after having fully discussed the evidence before you, the jury determines that it is necessary to communicate with me, you may send a note by the bailiff. You are not to reveal to me or anyone else how the jury stands until you have reached a verdict or unless you are instructed by me to do so.

A verdict form suitable to any conclusion you may reach will be submitted to you with these instructions.

# IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT, ADA COUNTY

☐ JUDGMENT OF CONVICTION

☒ PROBATION ORDER

☒ WITHHELD JUDGMENT

Expires 5.13.14

FILED 5/13/13 AT 1:30 P.M.  
CHRISTOPHER D. RICH,  
CLERK OF THE DISTRICT COURT  
BY D. Hagan  
Deputy

STATE OF IDAHO vs.  
Wade Tomlinson

DOB [REDACTED]  
SSN [REDACTED]

CASE NO. MD-12-14306 Digitals 12208

Prosecuting Agency: ☐ AC ☒ BC ☐ EC ☐ GC ☐ MC

State's Attorney: B. Bauges

DEFENDANT having been charged with the following offenses:

Count 1. DUI 180 8004

Count 2. \_\_\_\_\_

Count 3. \_\_\_\_\_

Count 4. \_\_\_\_\_

DEFENDANT WAS: ☒ Present ☐ In Custody ☐ Not Present ☐ Interpreter Present ☒ Advised of all rights and penalties per ICR 5,11, IMCR 5(f)

☒ Represented by: D. Smethers

COURT ENTERS JUDGMENT AFTER: ☐ Vol Guilty Plea ☒ Trial - Found Guilty

Defendant Waived Right: ☐ To All Defenses ☐ Against Self-Incrimination ☐ To Jury Trial ☐ To Confront and Cross Examine Accuser(s) ☐ To Counsel

☒ ORDERED: DEFENDANT'S DRIVING PRIVILEGES SUSPENDED 180 days beginning 2.12.13; or

☐ CONSECUTIVE TO ANY CURRENT SUSPENSION ☒ Absolute Suspension 30 days ☐ Interlock from \_\_\_\_\_ to \_\_\_\_\_

☒ ORDERED: DEFENDANT TO PAY TO THE CLERK: ☒ Apply cash bond \$ 500.00

Count 1: Fine/Penalty \$ 1000 W/ \$ 250 Suspended + CT Costs \$ CC = \$ \_\_\_\_\_

Count 2: Fine/Penalty \$ \_\_\_\_\_ W/ \$ \_\_\_\_\_ Suspended + CT Costs \$ \_\_\_\_\_ = \$ \_\_\_\_\_

Count 3: Fine/Penalty \$ \_\_\_\_\_ W/ \$ \_\_\_\_\_ Suspended + CT Costs \$ \_\_\_\_\_ = \$ \_\_\_\_\_

Count 4: Fine/Penalty \$ \_\_\_\_\_ W/ \$ \_\_\_\_\_ Suspended + CT Costs \$ \_\_\_\_\_ = \$ \_\_\_\_\_

☐ Reimburse Public Defender \$ \_\_\_\_\_ ☐ Workers' Comp (\$60/hr) \$ \_\_\_\_\_ TOTAL = \$ \_\_\_\_\_

Restitution \$ \_\_\_\_\_ Defendant shall make 10 EQUAL MONTHLY PAYMENTS BEGINNING ONE MONTH FROM TODAY

☒ ORDERED: DEFENDANT TO BE INCARCERATED IN: ☒ County Jail ☐ Juvenile Detention Center

Count 1: 90 days w/ 85 Suspended - Credit 2 Total = 3 TOTAL DAYS TO SERVE = 3

Count 2: \_\_\_\_\_ days w/ \_\_\_\_\_ Suspended - Credit \_\_\_\_\_ Total = \_\_\_\_\_ ☐ Concurrent to Case number(s): \_\_\_\_\_

Count 3: \_\_\_\_\_ days w/ \_\_\_\_\_ Suspended - Credit \_\_\_\_\_ Total = \_\_\_\_\_ ☐ Concurrent ☐ Consecutive

Count 4: \_\_\_\_\_ days w/ \_\_\_\_\_ Suspended - Credit \_\_\_\_\_ Total = \_\_\_\_\_ to all cases to any other cases

☐ \_\_\_\_\_ days must be fully completed, with NO OPTIONS available. ☐ \_\_\_\_\_ days must be fully completed, with INTERIM JAIL available.

☐ Pay or Stay \$ \_\_\_\_\_ ☐ In-Custody \_\_\_\_\_ SAP \_\_\_\_\_ ABC ☐ Interlock Funds (after use of any cafeteria funds)

☐ If approved by the Ada County Sheriff's Office, defendant is allowed to serve in \_\_\_\_\_ County at defendant's expense.

☒ THE FOLLOWING options offered by the County Sheriff are available to the defendant only IF defendant meets requirements of the program.

☒ All Options 3 days; ☐ If defendant is in custody, release and re-book for any options.

☐ Any combo of the following Options: Wk Rls \_\_\_\_\_ days; SLD \_\_\_\_\_ days; SCS \_\_\_\_\_ hours; Hs. Arr. (2/1) \_\_\_\_\_ days (1/1) \_\_\_\_\_ days

☒ PROBATION CONDITIONS: Supervised Probation Expires: \_\_\_\_\_ Unsupervised Probation Expires: 5.13.14

☒ No new crimes ☐ Classes/treatment per P.O. ☐ Discretionary jail to P.O. ☐ Alcohol Monitor Device Authorized

Programs Ordered: (Defined on Responsibilities Form) ☐ No Alcohol Poss/Consume ☐ Refuse no evidentiary test for drugs/alcohol (BAC)

☒ Alcohol/Drug Ed hrs 8 ☐ Anger Management hrs \_\_\_\_\_ ☐ Tobacco Ed hrs \_\_\_\_\_ ☐ Driving School hrs \_\_\_\_\_

☒ Victim's Panel ☐ Theft classes hrs \_\_\_\_\_ ☐ Domestic Violence Treatment Weeks \_\_\_\_\_ ☐ Cog Self Change \_\_\_\_\_

☐ OTHER \_\_\_\_\_

☒ Defendant accepted terms and conditions of probation and received a copy of this form and supplemental Notice of Responsibilities after Sentencing.

☒ PLEA AND SENTENCE VIA DEFENSE COUNSEL AUTHORIZED ☐ IN CHAMBERS PER WRITTEN GUILTY PLEA

Wade H. Tomlinson DEFENDANT John Hagan JUDGE 202 Number 5.13.13 Date of Order

☐ Release Defendant this case only

000099

# NOTICE OF DEFENDANT'S RESPONSIBILITIES AFTER SENTENCING

Defendant: Wade Allen Tomlinson

Case No. CR-MD-2012-0014306

Address: 2530 East Challis  
Meridian, ID 83646

Date Ordered: 5/13/2013

Judge: JOHN HAWLEY JR.

Phone:

Prosecuting Agency: Boise City Prosecuting Attorney

## HAVING PLEAD GUILTY TO OR BEEN FOUND GUILTY, I AGREE TO THE FOLLOWING TERMS OF SENTENCING: FOR ANY JAIL TIME ORDERED BY THE COURT.

*Within 48 hours (between 7:30 a.m. and 4:00 p.m., Monday - Friday except holidays), the defendant shall make immediate contact in person, pay any required fee, cooperate with, and follow all instructions of said agencies. Defendant shall not report to the Day Reporting Center with any trace of alcohol in his or her system. Failure to do so will result in the issuance of a warrant for your arrest.*

### Sheriff Court Services

200 W. Front Street 1<sup>st</sup> Floor  
(208) 287-7185

OR

### Day Reporting Center

7180 Barrister - Boise, Idaho  
(208) 577-3460

For any **Juvenile Detention/Community Service** report to: 400 N. Benjamin, Suite 201.

Juvenile Defendant to contact the shift Supervisor at 287-5632 or 287-5629, within 5 working days.

Total Days to Serve = \_\_\_\_\_ ☐ Concurrent ☐ Consecutive to any other cases. ☐ All Options Offered  
☐ Juvenile Community Service hrs: \_\_\_\_\_ to be completed by \_\_\_\_\_

## FOR ANY TERM OF PROBATION ORDERED BY THE COURT;

### UNSUPERVISED

- ☒ Notify Court of change of address ☒ Commit no crimes ☒ Pay all fines, costs, restitution & reimbursements  
☒ Enroll/complete court approved education or treatment program(s) as ordered ☒ Refuse no evidentiary testing

**SUPERVISED-** Contact Probation Services below within 24 hours. Take any and all court paperwork from your sentencing on this case. *Failure to do so will result in the issuance of a warrant for your arrest.*

**Ada County Misdemeanor Probation Services** - call within 24 hours, (208) 577-3380

8601 W Emerald St. Suite 150  
Boise, ID 83704

## FOR ANY AND ALL CLASSES ORDERED BY THE COURT;

*The defendant shall make immediate contact with the court-approved programs as chosen below, within 24 hours, pay any required fee, arrive at each class on time, and fully cooperate with program sponsors. Also, take all court paperwork from your sentencing on this case to each of the programs. Failure to complete these programs as ordered may result in the issuance of a warrant for your arrest for a violation of probation.*

- ☒ Alcohol/Drug Ed. hrs 8 ☐ Anger Management hrs \_\_\_\_\_ ☐ Tobacco Ed hrs \_\_\_\_\_ ☐ Driving School hrs \_\_\_\_\_  
☒ Victim's Panel ☐ Theft Classes hrs \_\_\_\_\_ ☐ Domestic Violence Treatment weeks \_\_\_\_\_ ☐ Cog Self Change  
☐ Other \_\_\_\_\_

Provider Chosen by defendant: (Place stickers here)

Wade A. Tomlinson

Defendant's Signature

5/13/13

Date

Dave Liddle & Associates  
600 N. Curtis St. Ste. 201  
Boise, ID 83706  
Ph. 424.3189  
WWW.Daveliddle.com

RELEASE OF INFORMATION: I hereby request and authorize the Department of Veterans Affairs to release information regarding my completion of the programs specified on this Judgment to Ada County Misdemeanor Probation Services (if supervised probation was ordered) or to the prosecuting agency as listed above (if defendant is ordered unsupervised probation)

MAY 13 2013

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHRISTOPHER D. RICH, Clerk  
By DEBBIE FINNEGAN  
DEPUTY

IN THE MATTER OF THE SUSPENSION OF THE  
DRIVER'S LICENSE OF:

Wade Allen Tomlinson  
2530 East Challis  
Meridian, ID 83646

Defendant.

DOB: \_\_\_\_\_  
DL or SSN: \_\_\_\_\_

Citation No: 1481950

Case No: CR-MD-2012-0014306

**ORDER SUSPENDING DRIVER'S LICENSE  
FOR A PLEA OF GUILTY OR FINDING OF  
GUILTY OF OFFENSE**

WJ X Interlock Device \_\_\_\_\_

Interlock Start: \_\_\_\_\_ End: \_\_\_\_\_

TO: THE IDAHO TRANSPORTATION DEPARTMENT AND THE ABOVE NAMED DEFENDANT

The Defendant having found guilty of the offense of Driving Under the Influence, i violation of Section 118-8004 M, which authorizes or requires the suspension of the driving privileges of the Defendant by the Court, and the Court having considered the same.

**NOW, THEREFORE, IT IS HEREBY ORDERED**, that the driving privileges and driver's license of the above named Defendant is hereby suspended for a period of 180 days commencing on

X 2.12.13; or

☐ at the end of any current suspension.

**YOU ARE FURTHER NOTIFIED**, that the expiration of the period of this suspension does not reinstate your driver's license and you must make application to the Idaho Transportation Department for reinstatement of your driver's license after the suspension period expires.

Dated: 5.13.13

Judge: [Signature]

I hereby certify that the foregoing is a true and correct copy of the original Order Suspending Driver's License For a Plea of Guilty or Finding of Guilty of Offense entered by the Court and on file in this office. I further certify that copies of this Order were served as follows:

Defendant: Wade Allen Tomlinson

Mailed \_\_\_\_\_

Hand Delivered X

Department of Transportation, Boise:

Mailed X

Hand Delivered \_\_\_\_\_

Dated: 5/13/13

CHRISTOPHER D. RICH  
Clerk of the Court

By: [Signature]  
Deputy Clerk

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
STATE OF IDAHO, ADA COUNTY, MAGISTRATE DIVISION MAY 13 2013

IN THE MATTER OF THE SUSPENSION OF THE DRIVER'S  
LICENSE OF:

Wade Allen Tomlinson  
2530 East Challis  
Meridian, ID 83646

Defendant.

DOB: \_\_\_\_\_  
DL or SSN: \_\_\_\_\_

Citation No: 1481950, CHRISTOPHER D. RICH, Clerk  
By DEIRDRE FINNEGAN  
DEPUTY

Case No: CR-MD-2012-0014306

TEMPORARY RESTRICTED LICENSE  
DURING SUSPENSION

WJ X INTERLOCK DEVICE \_\_\_\_\_

DATES FOR INTERLOCK START: \_\_\_\_\_ END: \_\_\_\_\_

TO: THE IDAHO TRANSPORTATION DEPARTMENT AND THE ABOVE NAMED DEFENDANT

The driving privileges of the Defendant having been suspended by the court by Order or Judgment, date 2.12.13, for a period of 180 days, and the Defendant having applied to the court for a Temporary Restricted License, and the court having determined that a Temporary Restricted License is appropriate and should be issued.

NOW, THEREFORE, IT IS HEREBY ORDERED, that the Defendant is hereby granted a Temporary Restricted License to drive motor vehicle for the next ☐ \_\_\_\_\_ days, or ☒ balance of suspension, commencing on the date of the order under the following restrictions and conditions:

- ☒ This license is valid only if defendant has in possession current proof of liability insurance on vehicle defendant is driving, only if s/he provides proof that s/he is driving within the scope of the temporary restricted license, and defendant has obtained a temporary restricted license permit in any other matter for which s/he has been suspended; the most restrictive conditions to apply.
- ☒ Defendant may drive directly to, during and from employment for employment purposes only at: MICRON TECH.  
M-F 5:00 AM - 7 PM
- ☐ Directly to and from \_\_\_\_\_
- ☒ No alcohol in bodily system while driving.
- ☒ May drive for medical purposes.
- ☐ Other: \_\_\_\_\_
- ☐ May drive to and from public service assignments.
- ☒ May drive to and from Alcohol Treatment Facilities and/or Victims Panel.
- ☒ May drive to and from Ada County Jail and any Ada County Jail options.
- ☒ May drive to and from supervised probation \_\_\_\_\_
- ☐ Must carry work/school schedule.

This Temporary Restricted License may be cancelled by order of the court for any violation of the above conditions and restrictions or by reason of a change of circumstances rendering the Temporary Restricted License unnecessary or inappropriate.

Dated: 5.13.13

[Signature]  
Magistrate Judge

STATE OF IDAHO )  
COUNTY OF ADA )

The undersigned Clerk of the above-entitled court hereby certifies that the forgoing is a true and correct copy of the original order staying suspension of driver's license and issuing a temporary license entered by the court and on file in this office.

Dated: 5/13/13

CHRISTOPHER D. RICH  
Clerk of the Court

By: [Signature] 000102  
Deputy Clerk

FILED 5/16/13 AT 244 M.  
 CHRISTOPHER D. RICH,  
 CLERK OF THE DISTRICT COURT  
 BY [Signature]  
 Deputy

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,

Plaintiff,

vs.

TOMLINSON, WADE

Defendant.

Case No. CR-MD-2012-14306

ORDER RELEASING CASH BOND

IT IS HEREBY ORDERED that the cash bond in the amount of \$ 500.00  
 heretofore posted on behalf of the above-named defendant be and the same is hereby ordered  
 released by the Clerk of the Court as follows:

- ☐ Forfeit as final disposition
- ☐ Forfeit for failure to appear
- ☐ Return to Payor \_\_\_\_\_
- ☒ Pay fines and costs due and owing in this case and return the remaining amount to  
 Payor at the following address:

\_\_\_\_\_  
 \_\_\_\_\_

[Signature] 5.13.13  
 JUDGE Date



IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 1:48

MAY 29 2013

STATE OF IDAHO  
Plaintiff,

CHRISTOPHER D. RICH, Clerk  
By CORRINE PRESLEY  
DEPUTY

vs.

Wade Allen Tomlinson  
2530 East Challis  
Meridian, ID 83646  
Defendant.

Case No: CR-MD-2012-0014306

DOB: [REDACTED]  
DL or SSN: [REDACTED]

NOTIFICATION OF PENALTIES FOR  
SUBSEQUENT VIOLATION OF  
DRIVING UNDER THE INFLUENCE (DUI)  
I.C. 18-8004

NOTICE: If you plead guilty to or are found guilty of driving under the influence (DUI), including withheld judgments, the penalties will be as follows:

1. A FIRST DUI is a misdemeanor, and you:
  - (a) May be jailed for up to six months; and fined up to \$1000; and
  - (b) Shall have your driving privileges suspended for up to 180 days. NOTICE: YOUR DRIVING PRIVILEGE WILL BE SUSPENDED FOR 30 DAYS. THIS IS AN ABSOLUTE SUSPENSION WITH NO DRIVING PRIVILEGES.
2. A SECOND DUI within 10 years is a misdemeanor, and you:
  - (a) Shall be jailed for at least 10 days and, up to 1 year, with the first 48 hours to be served consecutively, an five (5) days of which must be served in jail, and may be fined up to \$2000; and
  - (b) Shall have your driving privileges suspended for 1 year following your release from jail, with absolutely no driving privileges of any kind.
  - (c) Shall only drive a motor vehicle equipped with a functioning ignition interlock system following the the on (1) year mandatory license suspension period.
3. A DUI IS A FELONY IF IT IS: (1) a third DUI within 10 years; or (2) a subsequent DUI with a previous felony DUI, Aggravated DUI within 15 years; or (3) a second DUI within 10 years where in both cases there was an alcohol concentration of 0.20 or more; and you:
  - (a) Shall be sentenced to the custody of the State Board of Corrections for up to 10 years (but if the court imposes a jail sentence instead of the state penitentiary, it shall be for a minimum of 30 days), the first 4: hours to be served consecutively, and ten (10) days of which must be served in jail and may be fined up to \$5000; and
  - (b) Shall have your driving privileges suspended for at least 1 year and up to 5 years after release from custody, with absolutely no driving privileges of any kind.
  - (c) Shall only drive a motor vehicle equipped with a functioning ignition interlock system following the one (1) year mandatory license suspension period.

I HAVE READ THIS ENTIRE DOCUMENT; I HAVE HAD IT EXPLAINED TO ME; AND I HAVE RECEIVED A COPY

Dated: 5-12-13  
Wade A. Tomlinson  
Defendant

000104

DAVID J. SMETHERS  
Attorney at Law  
1000 S. Roosevelt St.  
Boise, Idaho 83705  
208-336-1145  
FAX 208-336-1263

NO. \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. \_\_\_\_\_  
3:15

JUN 17 2013

CHRISTOPHER D. RICH, Clerk  
By KATRINA CHRISTENSEN  
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT IN AND FOR  
THE COUNTY OF ADA

STATE OF IDAHO,	)	Case No. 2012-14306
	)	
Plaintiff,	)	MEMORANDUM IN SUPPORT OF RULE
vs.	)	35 MOTION TO REDUCE SENTENCE
	)	
TOMLINSON, Wade	)	
	)	
Defendant	)	

I. STATEMENT OF THE CASE

A. Nature of the Case

Idaho Criminal Rule 35 Request for Reconsideration of Sentence.

B. Procedural History and Statement of Facts

The defendant was convicted of a DUI, first offense, at jury trial, and was sentenced as follows: A withheld judgment, \$1000/250 plus court costs, 90/85, (credit 2), all options, Victim's Panel, eight hours of alcohol treatment, one year unsupervised probation, and a 180 day driver's license suspension backdated 90 days to February 12, 2013. A timely I.C.R. 35 Motion to Reduce Sentence was filed, this memorandum and materials in support follow.

II. ISSUE PRESENTED FOR REVIEW

Is the sentence imposed warranted under the facts in this case and necessary to advance the goals of criminal punishment?

ORIGINAL

MEMORANDUM IN SUPPORT OF RULE 35 MOTION TO REDUCE SENTENCE

### III. ARGUMENT

#### The Sentence Imposed Is Not Warranted Under The Facts In This Case And Not Necessary To Advance The Goals Of Criminal Punishment.

Defendant acknowledges the sentence pronounced is well within the statutory limits and this MOTION is a purely a plea for leniency. The only term and condition the defendant is asking this Court to reconsider is the length of the backdated driver's license suspension.

The four goals of criminal punishment are as follows: (1) protection of society; (2) deterrence of the individual and the public generally; (3) possibility of rehabilitation; and (4) punishment and retribution for wrongdoing.<sup>1</sup> These factors will be briefly addressed to remind the Court of the facts and circumstances in this case. The court may consider facts presented at the original sentencing for purposes of Rule 35.<sup>2</sup>

The protection of society is the most important factor to be considered in sentencing.<sup>3</sup> The defendant is a forty-four year old engineer employed at Micron with no criminal record prior to this case. The defendant has been married for thirteen years and has two children. The BACs in this case were .082/.083, though over the legal limit and the jury so found, the readings were not excessive and there was no accident involved. The defendant was totally cooperative and polite with law enforcement during the entire investigation and arrest.

Deterrence is not a large factor in this case; the sentence pronounced provides a huge deterrence to the defendant.

---

<sup>1</sup> State v. Sarabia, 125 Idaho 815; State v. Toohill, 103 Idaho 565.

<sup>2</sup> State v. Hassett, 110 Idaho 570.


<sup>3</sup> State v. Kern, 119 Idaho 295.

Rehabilitation is the most important factor in this case. Since the defendant has led a crime free life for forty-four years, it could be argued he is not in need of rehabilitation. That being said, the defendant took the steps to pay for and obtain an evaluation that was not ordered by the Court and then completed the requisite treatment within three weeks of the sentencing date, (see Attachment "A", Completion Letter/Discharge Summary). The defendant now possesses the tools to deal with any potential issue involving alcohol and driving in the future. To further establish his amenability to treatment and the ability to follow Court orders, the defendant has completed the Victim's Panel, (see Attachment "B"), and the requisite hours of community service in lieu of jail. The fine and court costs are paid.

The Defendant contends the sentence requested is sufficient punishment for the crime the Defendant was found guilty of.

#### IV. CONCLUSION

The defendant has fulfilled all terms of probation and terms of sentence that he is able to satisfy to date. These mandates were accomplished in a mere thirty-two days since the date of sentencing. The only condition remaining is to break no laws for the duration of his probation. The relief requested in this Idaho Criminal Rule 35 motion to reduce sentence is that this Court backdate the driver's license suspension to October 26, 2012, (the date of the ALS suspension). The defendant would then be eligible for unrestricted driving privileges on the date of the signing of this order.

  
\_\_\_\_\_  
David J. Smethers  
Attorney at Law

6-17-12  
\_\_\_\_\_  
Date

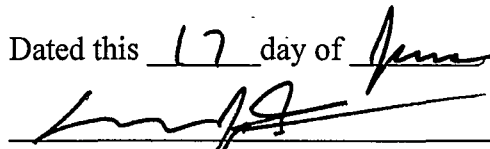
CERTIFICATE OF SERVICE: This certifies that a true and correct copy of the  
above and forgoing instrument was: ☐ Mailed; ☒ Faxed; ☐ Hand Delivered, to:

☐ Ada County Prosecutor;

☐ Boise County Prosecutor;

☒ Boise City Prosecutor;

\_\_\_\_\_  
Dated this 17 day of June 2013

  
\_\_\_\_\_  
David J. Smethers

**Dave Liddle & Associates**

Phone (208) 424-3189 ♦ Email admin@daveliddle.com ♦ 600 N Curtis Road, Ste 201 Boise, ID 83706

**Completion Letter/Discharge Summary**

June 3, 2013

Honorable John Hawley  
Ada County Courthouse  
200 W. Front St  
Boise, Idaho 83702

Re: St. vs. Wade Tomlinson – Case #CR-MD-2012-0014306

Dear Judge Hawley:

Please note the following described status with respect to Wade Tomlinson:

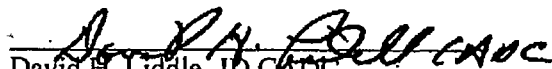
**Completed 8 hours of substance abuse education on June 1, 2013.**

**Discharge Summary:**

- I. Initial Assessment Diagnosis:** Client meets the criteria for DSM-IV 303.00 Substance Intoxication.
- II. Problem Identified:** Client needs further education in order to make better decisions about substance use.
- III. Objectives:**
  - A.** Client will attend early intervention education classes to further their knowledge of the effects of psychoactive substances and the consequences of use.
    - 1. Progress:** Complete the following instructional objectives of the early intervention education class:
      - a.** Alcohol use and abuse
        - i. Physiological and psychological effects
        - ii. Effects of alcohol use on driving
      - b.** Psychoactive Substances:
        - i. General classifications & effects
      - c.** Abuse and Addiction
    - B.** Client will complete Level II evaluations (pre-test and post-test) to indicate the increase in their knowledge regarding psychoactive substances.
      - 1. Progress:** Complete
        - a.** Pre-test Score: 75% (51/68) Post-test Score: 100% (68/68)
  - IV. Final Assessment/Observations/Recommendations:** Client attended early intervention education classes on a regular basis and participated in class. He has completed the required number of hours and the objectives outlined by the intervention plan. No further recommendations are given at this time.

Please advise if you have any questions.

Sincerely,

  
David H. Liddle, JD CADU

ATTACHED 000109

*This certifies that Wade Tomlinson*

*Case # CR-MD-2012-0014306*

*Date of Birth: 11/23/1970*

*Completed a Victim's Panel at the office  
Dave Liddle & Associates*

*Date: June 14, 2013*

*David H. Lee*

---

202

FILED 315  
A.M. P.M.

DAVID J. SMETHERS  
Attorney at Law  
1000 S. Roosevelt St.  
Boise, Idaho 83705  
208-336-1145  
FAX 208-336-1263


JUN 17 2013

CHRISTOPHER D. RICH, Clerk  
By KATHINA CHRISTENSEN  
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT IN AND FOR  
THE COUNTY OF ADA

STATE OF IDAHO,	)	Case No. 2012-14306
	)	
Plaintiff,	)	RULE 35 MOTION TO REDUCE
vs.	)	SENTENCE
	)	
TOMLINSON, Wade	)	
	)	
Defendant	)	

Comes now the defendant, by and through his attorney of record, and requests this Court to reduce the defendant's sentence by backdating the driver's license suspension to the date of the Administrative License Suspension of October 26, 2012. A memorandum and a PROPOSED ORDER accompany this MOTION. A hearing is requested.

	6-17-13
David J. Smethers	Date
Attorney at Law	

CERTIFICATE OF SERVICE: This certifies that a true and correct copy of the above and forgoing instrument was: ☐ Mailed; ☒ Faxed; ☐ Hand Delivered, to:

☐ Ada County Prosecutor;

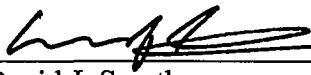
☐ Boise County Prosecutor;

☒ Boise City Prosecutor;

ORIGINAL



\_\_\_\_\_  
Dated this 17 day of June 2013

  
\_\_\_\_\_  
David J. Smethers

189

NO. \_\_\_\_\_  
A.M. \_\_\_\_\_ FILED P.M. 2:27

JUN 24 2013

CHRISTOPHER D. RICH, Clerk  
By ELAINE TONG  
DEPUTY

DAVID J. SMETHERS  
Attorney at Law  
1000 S. Roosevelt St.  
Boise, Idaho 83705  
208-336-1145  
FAX 208-336-1263

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT IN AND FOR

THE COUNTY OF ADA

**RECEIVED IN TRANSCRIPTS**  
6/27/13

STATE OF IDAHO,

Plaintiff,

vs.

TOMLINSON, Wade

Defendant

) CR-MD-2012-14306

) NOTICE OF APPEAL

1. NOTICE IS HEREBY GIVEN That the above named defendant, Wade Tomlinson, appeals to the District Court of the 4<sup>th</sup> Judicial District the withheld judgment entered by the Honorable John T. Hawley May 13, 2013, at sentencing after the jury's finding of guilt.
2. The defendant has the right to appeal to the District Court pursuant to Idaho Criminal Rule 54.1(b). This appeal is taken upon matters of fact and law. The proceedings of the matter appealed from are recorded electronically and are in the possession of the Ada County Clerk.
3. The defendant requests preparation of a partial transcript of the jury trial held on April 14, 2013, in front of the Honorable John T. Hawley, consisting of the following: All testimony by witnesses; Opening statements and closing arguments; All arguments and rulings made on the record when the jury was

present or excused; The conference on jury instructions and the court's ruling thereon.

The defendant is NOT requesting transcripts of: The voir dire of the jury by the court and counsel; The oral presentation by the court of written instructions given to the jury; The sentencing hearing.

4. Issue presented on appeal including but no limited to:

-Due process violations consisting of: Denial of the defendant's right to present a defense; Denial of the ability to effectively confront and cross examine witnesses.

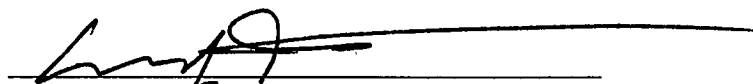
-Prosecutorial misconduct.

-Erroneous rulings by the Court.

5. I certify: That a copy of this notice of appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out as follows: Ada County Clerk, 200 W. Front, Boise, Idaho 83702.; That service has been made upon all parties required to be served pursuant to Idaho Criminal Rule 54.4(h).

The defendant requests the District Court to take judicial notice of the contents of the magistrate file in this case. A MEMORANDUM IN SUPPORT will follow.

DATED THIS 23 day of June, 2013.

  
\_\_\_\_\_  
David J. Smeethers  
Attorney for Appellant

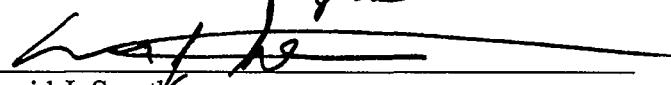
CERTIFICATE OF SERVICE: This certifies that a true and correct copy of the  
above and forgoing instrument was: ☐ Mailed; ☒ Faxed; ☐ Hand Delivered, to:

☐ Ada County Prosecutor;

☐ Boise County Prosecutor;

☒ Boise City Prosecutor;

\_\_\_\_\_  
Dated this 23 day of June 2013

  
\_\_\_\_\_  
David J. Smethers

189

NO. 06 FILED  
A.M. 10 P.M.

JUL 01 2013

CHRISTOPHER D. RICH, Clerk  
By RAE ANN NIXON  
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,	)	
	)	
Plaintiff/Respondent,	)	
	)	Case No. CRMD-2012-0014306
vs.	)	
	)	ESTIMATED COST OF
	)	APPEAL TRANSCRIPT
	)	
WADE TOMLINSON,	)	
	)	
	)	
Defendant/Appellant.	)	
_____	)	

Notice of Appeal having been filed in the above-entitled matter on **June 24, 2013**, and a copy of said Notice having been received by the Transcription Department on **June 28, 2013**, I certify the estimated cost of preparation of the transcript to be:

Type of Hearing: Appeal  
Date of Hearing: April 17, 2013 Judge: John Hawley, Jr.  
**175 Pages x \$3.25 = \$568.75**

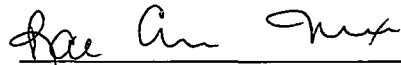
Pursuant to Idaho Rules of Civil Procedure, Rule 83(k)(1), the appellant must, unless otherwise ordered by a District Judge, pay the estimated fee for the preparation of the transcript within fourteen (14) days after the filing of the Notice of Appeal, and the appellant shall pay the balance of the fee, if any, for the transcript upon completion.

Upon payment of the estimated fees, the transcriber will prepare the transcript and lodge it with the Clerk of the District Court within thirty-five (35) days from the date of the payment of the estimated fees. The transcriber may make application to the District Judge for an extension of time in which to prepare the transcript.

Please make checks payable to: **SUE WOLF**, and mail or deliver to the Transcription Department, 200 West Front Street, Room 4172, Boise, Idaho, 83702.

**Failure to pay the required fees in a timely manner may be grounds for sanctions as the District Court deems appropriate, which may include DISMISSAL OF THE APPEAL.**

Dated this 1<sup>ST</sup> day of July, 2013.



RAE ANN NIXON  
Transcript Coordinator

**CERTIFICATE OF MAILING**

I certify that on this 1<sup>st</sup> day of July, 2013, a true and correct copy of the Estimated Cost of Appeal Transcript was forwarded to Appellant or Appellant's attorney of record, by first class mail, at:

DAVID J. SMETHERS  
ATTORNEY AT LAW  
1000 S. ROOSEVELT ST  
BOISE ID 83705



RAE ANN NIXON  
Transcript Coordinator

JUL 08 2013

CHRISTOPHER D. RICH, Clerk  
By AMY LYCAN  
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,

Plaintiff,

vs.

WADE TOMLINSON,

Defendants.

Case No. CR-MD-2012-14306

ORDER GOVERNING  
PROCEDURE ON APPEAL

Notice of Appeal having been filed herein, and it appearing that a transcript of all the testimony of the original trial or hearing is required by Appellant to resolve the issues on appeal:

It is ORDERED:

- 1) That Appellant shall order and pay for the estimated cost of the transcript within 14 days after the filing of the notice of appeal.
- 2) That Appellant's brief shall be filed and served on or before October 1st, 2013.
- 3) That Respondent's brief shall be filed and served on or before November 11<sup>th</sup>, 2013.
- 4) That Appellant's reply brief, if any, shall be filed and served on or before December 2<sup>nd</sup>, 2013.
- 5) Oral Argument will be heard at the Ada County Courthouse, 200 W. Front Street Boise, Idaho on December 19<sup>th</sup>, 2013 @ 3:00pm.

Dated this 8<sup>th</sup> day of July 2013.

  
MICHAEL MCLAUGHLIN  
Senior District Judge


CERTIFICATE OF MAILING

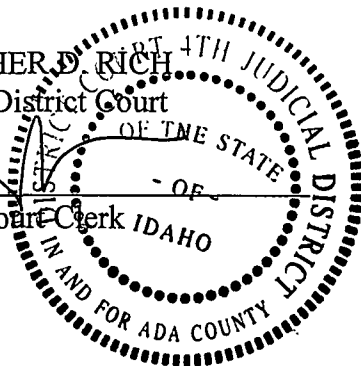
I hereby certify that on this 8<sup>th</sup> of July, 2013 I mailed (served) a true and correct copy  
of the within instrument to:

Boise City Prosecutor  
Interdepartmental Mail

David J. Smethers  
Attorney at Law  
1000 South Roosevelt Street  
Boise, ID 83705

CHRISTOPHER D. RICH  
Clerk of the District Court

By:  \_\_\_\_\_  
Deputy Court Clerk IDAHO





AUG 29 2013

CHRISTOPHER D. RICH, Clerk  
By KATRINA CHRISTENSEN  
DEPUTY

CARY COLAIANNI  
BOISE CITY ATTORNEY

Brenda M. Bauges  
Assistant City Attorney  
BOISE CITY ATTORNEY'S OFFICE  
P.O. Box 500  
Boise, Idaho 83701-0500  
Telephone: (208) 384-3870  
Idaho State Bar No. 8185

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE STATE OF IDAHO,

Plaintiff,

v.

WADE ALLEN TOMLINSON,

Defendant.

Case No. CR-MD-2012-0014306

**MOTION TO DISMISS APPEAL**

COMES NOW, the state of Idaho, by and through their attorney of record, the Boise City Attorney's Office, and moves to DISMISS the Appeal herein. The Motion is based upon the Defendant's failure to pay for the transcript within the allotted amount of time, pursuant to I.C.R. 54.7, Idaho Appellate Rule 24(d), and the Court's own Order Governing Procedure on Appeal.

The Defendant filed his notice of appeal on June 24, 2013. As of the drafting of this motion, the Defendant is over seven weeks past due in paying for the transcript. This failure to follow the Court's Order and comply with the Idaho Criminal and Appellate Rules delays the efficient resolution of this appeal and effectively operates as a failure to prosecute the appeal. The State therefore requests the Court to dismiss this appeal pursuant to Idaho Appellate Rule 21 which states in part, "[f]ailure of a party to timely take any other step in the appellate process

MOTION TO DISMISS APPEAL

mat 000120

shall not be deemed jurisdictional, but may be grounds only for such action or sanction as the [ ] Court deems appropriate, which may include dismissal of the appeal.”

DATED this 28 day of August, 2013.

  
\_\_\_\_\_  
Brenda M. Bauges  
Assistant City Attorney

**CERTIFICATE OF MAILING**

I **HEREBY CERTIFY** that on this 28 day of August, 2013, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

David J. Smethers  
Attorney at Law,  
1000 S. Roosevelt St.,  
Boise Idaho 83705

☒ **US MAIL**  
☐ **INTERDEPARTMENTAL MAIL**  
☐ **FACSIMILE**  
☐ **HAND DELIVER**

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*hinda auger*

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NO. \_\_\_\_\_ FILED 3:15  
A.M. \_\_\_\_\_ P.M.

AUG 30 2013

CHRISTOPHER D. RICH, Clerk  
By ELAINE TONG  
DEPUTY

DAVID J. SMETHERS  
Attorney at Law  
1000 S. Roosevelt St.  
Boise, Idaho 83705  
208-336-1145  
FAX 208-336-1263

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT IN AND FOR  
THE COUNTY OF ADA

STATE OF IDAHO,

Plaintiff,

vs.

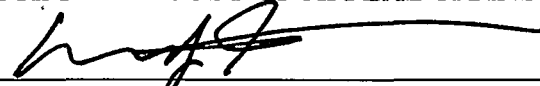
TOMLINSON, Wade,

Defendant

) Case No.: CR 2012-14306

) OBJECTION TO MOTION TO DISMISS  
) APPEAL

The defendant objects to the state's MOTION TO DISMISS APPEAL as the  
estimated cost of the appeal transcript was paid in a timely manner as mandated in the  
ESTIMATED COST OF APPEAL TRANSCRIPT filed on July 1, 2013.

  
David J. Smethers, Attorney at Law

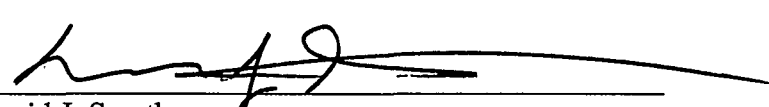
8-29-13  
Date

CERTIFICATE OF SERVICE

I hereby certify that on the 29 day of Aug, 2013, a true and  
correct copy of the foregoing document was:

\_\_\_\_\_ Hand delivered ☒ Faxed \_\_\_\_\_ Mailed to the:

☒ Boise City Prosecutor

  
David J. Smethers

SEP 03 2013

CHRISTOPHER D. F. ... Clerk  
By RAE ANN NIXON  
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO, )  
 )  
Plaintiff/Respondent, )  
 )  
vs. )  
 )  
WADE ALLEN TOMLINSON, )  
 )  
Defendant/Appellant. )  
\_\_\_\_\_ )

Case No. CRMD-2012-0014306

NOTICE OF LODGING OF  
APPEAL TRANSCRIPT

To: Brenda Bauges, Attorney for Respondent.

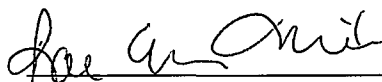
To: David Smethers, Attorney for Appellant.

PLEASE TAKE NOTICE THAT a transcript of the proceeding in this action was lodged with the Court on **September 3, 2013**.

YOU ARE NOTIFIED that you may pick up a copy of said transcript at the District Clerk's Office, Ada County Courthouse, 200 West Front Street, Boise, ID 83702.

Unless objections to the content of the transcript are received within twenty-one (21) days from the date of mailing of this notice, such transcript shall be deemed settled.

Date this 3rd day of September, 2013.



RAE ANN NIXON

Deputy Clerk of the District Court

I hereby certify that on this 3rd day of September, 2013, a true and correct copy of the Notice of Lodging was sent via US Mail to:

BOISE CITY ATTORNEY  
POST OFFICE BOX 500  
BOISE ID 83701-0500  
BRENDA BAUGES

DAVID SMETHERS  
ATTORNEY AT LAW  
1000 S. ROOSEVELT ST  
BOISE ID 83705



---

RAE ANN NIXON  
Deputy Clerk of the District Court

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12/19  
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NO. 9  
A.M. \_\_\_\_\_ P.M. \_\_\_\_\_  
FILED

SEP 12 2013

CHRISTOPHER D. RICH, Clerk  
By KATRINA CHRISTENSEN  
DEPUTY

CARY COLAIANNI  
BOISE CITY ATTORNEY

Brenda M. Bauges  
Assistant City Attorney  
BOISE CITY ATTORNEY'S OFFICE  
P.O. Box 500  
Boise, Idaho 83701-0500  
Telephone: (208) 384-3870  
Idaho State Bar No. 8185

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE STATE OF IDAHO	)	
	)	
Plaintiff,	)	Case No. CR-MD-2012-0014306
	)	
v.	)	
	)	<b>NOTICE OF WITHDRAWAL OF</b>
WADE ALLEN TOMLINSON	)	<b>MOTION TO DISMISS</b>
	)	
Defendant.	)	
	)	


---

COMES NOW the State of Idaho, by and through Brenda M. Bauges, Assistant Boise City Attorney, and hereby notifies this Court and counsel that the State withdraws its motion to dismiss. Though the State's information at the time of filing its motion was that the Defendant failed to timely pay the transcript as required pursuant to the Order Governing Procedure on Appeal and Idaho Appellate Rule 24(d), it appears that the payment has now been made.

✓

Though untimely pursuant to the State's information, as the appeal can now proceed, the State withdraws its request to have the appeal dismissed.

DATED this 12 day of September 2013.

  
Brenda M. Bauges  
Assistant City Attorney

**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that on this 12 day of September 2013, I served a true and correct copy of the foregoing document upon the following person(s) by the method indicated below:

David J. Smethers  
Attorney at Law,  
1000 S. Roosevelt St.  
Boise Idaho 83705

☐ US MAIL  
☐ INTERDEPARTMENTAL MAIL  
☐ FACSIMILE  
☐ HAND DELIVER





OCT 03 2013

CHRISTOPHER D. RICH, Clerk  
By AMY LYCAN

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,  
Plaintiff/Respondent,

Case No. CR-MD-2012-14306

vs.

**CONDITIONAL ORDER  
DISMISSING APPEAL**

WADE ALLEN TOMLINON,  
Defendant/Appellant.

It appearing to the Court upon a review of the record in the above-entitled action that the Court entered an Order on July 8<sup>th</sup> 2013, requiring the Appellant to file with this Court an Appellant's Brief by October 1<sup>st</sup>, 2013; and it further appearing that the time for filing said brief has now expired;

IT IS HEREBY ORDERED, that the appeal in the action be and the same is hereby dismissed fourteen (14) days from the filing date of this Order, unless on or before that date the Appellant takes the necessary steps to furnish the requisite brief necessary to complete the appeal in the matter.

Dated this 2 day of October 2013.

  
\_\_\_\_\_  
MICHAEL MCLAUGHLIN  
Senior District Judge

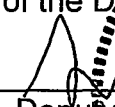
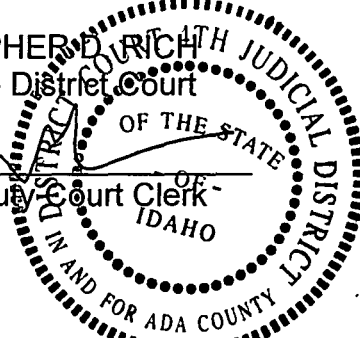
KW

CERTIFICATE OF MAILING

I hereby certify that on this 4<sup>th</sup> day of October 2013, I mailed (served) a true and correct copy of the within instrument to:

Boise City Attorney  
Interdepartmental Mail

David J Smethers  
Attorney at Law  
1000 S. Roosevelt Street  
Boise, ID 83705

CHRISTOPHER D. REATH  
Clerk of the District Court  
By  Deputy Court Clerk  


189

DAVID J. SMETHERS  
Attorney at Law  
1000 S. Roosevelt St.  
Boise, Idaho 83705  
208-336-1145  
FAX 208-336-1263

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
AM. \_\_\_\_\_ P.M. \_\_\_\_\_  
OCT 15 2013  
CHRISTOPHER D. RICH, Clerk  
By MAURA OLSON  
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT IN AND FOR  
THE COUNTY OF ADA

STATE OF IDAHO, )  
 ) Case No.: *MD-12-14306* ~~CR 2012-4306~~  
 )  
 ) Plaintiff, )  
 ) MOTION TO EXTEND TIME TO FILE  
 )  
 ) vs. )  
 )  
 )  
 ) TOMLINSON, Wade, )  
 )  
 )  
 ) Defendant )

The defendant requests this Court to extend time to file appellant's brief for two weeks based on the following:

- This Court issued an ORDER GOVERNING PROCEDURE ON APPEAL on July 8, 2013;
- The jury trial transcript was ordered, and paid for on July 14, 2013, (Idaho Criminal Rule 54.7(b) Preparation of transcript. , states the transcript must be lodged within 35 days of the payment. Appellant is NOT objecting/complaining about the late lodging of the transcript, this information is included for use by this Court in deciding this MOTION);
- The jury trial transcript necessary for the preparation of appellant's brief was not lodged until September 3, 2013;
- Appellant's brief was to be filed on October 1, 2013;

ORIGINAL

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-The Notice of Lodging of Appeal Transcript was sent to appellant's counsel's office sometime after September 3, 2013;

-The Notice of Lodging was not forwarded to counsel upon receipt in counsel's office, (an internal oversight by counsel's office);

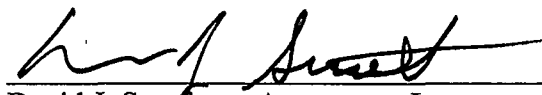
-Counsel noticed the transcript had not been received, and tracked down the Notice of Lodging;

-The transcript was picked up around the time appellant's brief was due;

-Counsel received a CONDITIONAL ORDER DISMISSING APPEAL on October 7, 2013, (said ORDER was filed on October 3, 2013); this MOTION and PROPOSED ORDER follows;

-Counsel's heavy case load has made it difficult to file the brief within the time frame specified in the ORDER, (scheduled jury trials included a Lewd and Lascivious, (settled two weeks before trial), 1<sup>st</sup> Degree Arson, (settled a week before trial), Felony DUI, (scheduled October 31), Burglary/Grand Theft, (settled a week before trial), Memorandum in support for a Petition for Review, (Supreme Court, filed on 10-15), Misdemeanor Battery trial in Cascade, Idaho, on 10-22), and numerous court appearances);

Counsel has spoken with opposing counsel for the state, and opposing counsel has no objection to this MOTION if filing dates are adjusted to allow opposing counsel time to respond within the limits of the rule(s). A hearing is requested, and/or in the alternative, a PROPOSED ORDER accompanies this MOTION.

  
David J. Smeyers, Attorney at Law

10-15-13  
Date

CERTIFICATE OF SERVICE


I hereby certify that on the 15 day of Oct, 2013, a true and correct copy of the foregoing document was:

       Hand delivered ✓ Faxed        Mailed to the:

       Boise County Prosecutor

       Ada County Prosecutor

✓ Boise City Prosecutor

  
\_\_\_\_\_  
David J. Smethers

RECEIVED

OCT 15 2013

ADA COUNTY CLERK

DAVID J. SMETHERS  
Attorney at Law  
1000 S. Roosevelt St.  
Boise, Idaho 83705  
208-336-1145  
FAX 208-336-1263

NO. \_\_\_\_\_  
FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 315

OCT 17 2013

CHRISTOPHER D. RICH, Clerk  
By AMY EDWARDS  
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT IN AND FOR  
THE COUNTY OF ADA

STATE OF IDAHO,

Plaintiff,

vs.

TOMLINSON, Wade,

Defendant

MD-12-14306  
) Case No.: CR 2012-4306

) PROPOSED ORDER EXTENDING TIME  
) FOR FILING OF APPELLANT'S BRIEF  
)  
)  
)  
)

After consideration of the appellant's motion, applicable rules, review of the court file,  
and taking into consideration that the state does not object to appellant's MOTION with  
modified dates, it is ordered as follows:

1) Appellant's brief is now due on or before November 4, 2013.

2) Respondent's brief shall be filed on or before December 16, 2013.

3) Appellant's reply brief, if any, shall be filed and served on or before January 6  
2014, 2013.

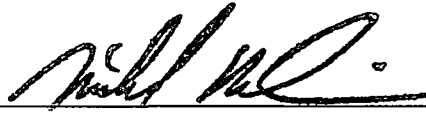
4) Oral argument will be heard at the Ada County Courthouse, 200 W. Front Street,

Boise, Idaho on January 16, 2014, at the hour of 1:00 ~~AM~~ PM.

It Is So Ordered.

ORIGINAL

Dated this 17 day of October, 2013.



MICHAEL MCLAUGHLIN  
Senior District Judge

CERTIFICATE OF MAILING

I hereby certify that on this 17th day of October, 2013, I mailed a true  
and correct copy of the within instrument to:

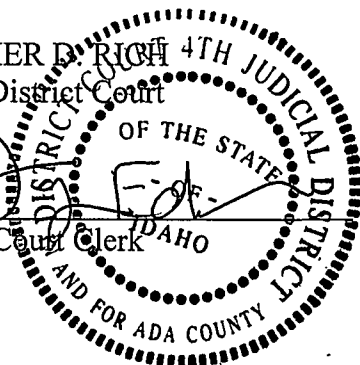
Boise City Prosecutor  
Interdepartmental Mail

David J. Smethers  
Attorney at Law  
1000 S. Roosevelt St.  
Boise, Idaho 83705

CHRISTOPHER D. RICH  
Clerk of the District Court

By: 

Deputy Court Clerk



189  
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DAVID J. SMETHERS  
Attorney at Law  
1000 S. Roosevelt St.  
Boise, Idaho 83705  
208-336-1145  
FAX 208-336-1263

NO. \_\_\_\_\_  
A.M. \_\_\_\_\_ FILED P.M. 31

NOV 04 2013

CHRISTOPHER D. RICH, Clerk  
By AMY LANG  
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT IN AND FOR  
THE COUNTY OF ADA

STATE OF IDAHO,	)	Case No. CRMD 2012-14306
	)	
Plaintiff,	)	MEMORANDUM IN SUPPORT OF
vs.	)	APPEAL
	)	
TOMLINSON, Wade	)	
	)	
Defendant	)	

---

I. STATEMENT OF THE CASE

A. Nature of the Case

Appeal from the jury verdict.

B. Procedural History

Defendant Wade Tomlinson, (hereafter "Tomlinson"), was charged with driving under the influence in Citation # 1481950, entered a plea of "not guilty", and the matter was set for jury trial. The jury trial was continued at Tomlinson's request on two occasions. The state filed a MOTION IN LIMINE on March 4, 2013. The state did not request a hearing at the time said motion was filed. The state did not ever file a request for hearing on the MOTION IN N LIMINE. A TRIAL STATUS MEMORANDUM was filed on November 19, 2012, ordering the state to prepare a formal complaint for trial by "1 week prior". The formal complaint was filed on April 17, 2013- the morning of the jury trial. The jury trial was held, at which time the jury returned a verdict of "guilty". Tomlinson was sentenced,



and a timely appeal was filed. The state filed a MOTION TO DISMISS the appeal, the defendant filed an OBJECTION, at which time the state withdrew their MOTION TO DISMISS. This memorandum in support follows.

### C. Statement of Facts

Boise City Police Officer David Frederick, (hereafter "Frederick"), seized Tomlinson's vehicle at 10:45 PM, (Jury Trial transcript, (hereafter "Tr", p 77, ll 7-8), for committing two infractions- touching the double yellow line while exiting from a parking lot, and not utilizing the closest available lane when making a left hand turn. Tomlinson performed the field sobriety tests, and was subsequently arrested for suspicion of driving under the influence. Tomlinson submitted two breath samples at forty-four and forty-six minutes after the time of the stop, (Tr p 78, ll 1-7). Tomlinson had not been driving for approximately forty-five minutes prior to submitting the two samples, (Tr p 78, ll 7-10). At the time of the seizure, (when Tomlinson was last driving at 10:45 PM), he was traveling to his residence in Meridian, Idaho, approximately ten miles from the location of the seizure, (Tr p 123, ll 1-2, see also Defendant's A, p 124, ll 4). The driving time from the location of the seizure to Tomlinson's residence is about 15-20 minutes, (Tr p 122, ll 22-25).

## II. ISSUES PRESENTED FOR REVIEW

1. Should Tomlinson's request for a continuance been granted at the time the state filed the formal COMPLAINT on the morning of jury trial?
2. Was Tomlinson denied due process of law by the Court's erroneous rulings in matters of law and evidence?

## III. ARGUMENT

A. Tomlinson's request for a continuance should have been granted at the time the state filed the formal COMPLAINT on the morning of jury trial.

Tomlinson was charged under 18-8004 by citation. The morning of jury trial, the state filed a formal complaint that could be interpreted as an attempt to proceed “per se”, with the language stating, “...with an alcohol concentration of .08 or more, as shown by analysis of blood, urine, or breath,...”. Prior to jury trial, the state filed a MOTION IN LIMINE requesting the following ruling from the Court, “... and hereby moves this Court to exclude any evidence or testimony, whether elicited by a defense of State witness, regarding the measurement of the uncertainty or margin of error for the LifeLoc FC20 device or regarding the rising of the Defendant’s blood alcohol content (BAC).” The state’s motion in limine did not specifically limine in out field sobriety tests or other evidence concerning impairment. There was no written ORDER by the Court on the motion in limine, the Judge made rulings on the motion on the morning of and during the jury trial. The state listed two issues specifically in the motion in limine- margin of error and rising of blood alcohol content. Tomlinson is entitled to notice as to evidence allowed and not allowed. Tomlinson was precluded from presenting evidence through cross-examination about FSTs, BAC at the time of the seizure, and other issues of impairment not listed in the state’s motion in limine. Since there was no written order from the Court addressing the state’s specific requests in the motion, the Court went beyond the request in the motion in limine and denied Tomlinson due process by excluding evidence of time frames and impairment.

Misdemeanor Criminal Rule 3(d) allows the state to amend a pleading prior to the state resting if the defendant is not prejudiced. In this case, Tomlinson was prejudiced by the amendment the morning of trial. Tomlinson prepared for trial based on the citation issued the night of the incident. The state did not actually file the COMPLAINT until the

morning of trial. Tomlinson did not have sufficient notice of the hearing on the morning of trial. A MOTION IN LIMINE is defined as follows:

“What counsel refers to as a **motion to suppress** may be more properly denominated, in this case, a **motion in limine**. While no statute or rule expressly authorizes such a motion, this Court has recognized its existence and stated that it “enables a judge to rule on evidence without first exposing it to the jury.... The court's ruling on the motion enables counsel on both sides to make strategic decisions before trial concerning the content and order of evidence to be presented.” Davidson v. Beco Corporation, 112 Idaho 560, 563, 733 P.2d 781, 784 (Ct.App.1986), *modified on other grounds*.”

The dispositive language here is, “The court's ruling on the motion enables counsel on both sides to make strategic decisions **before trial**...”, (emphasis added). MCR 3(d) allows for a continuance in the Court’s discretion. The state could and should have noticed the Motion before the morning of jury trial, and filed the Complaint in a timely manner.<sup>1</sup> Tomlinson asked for a continuance, arguing, “...Judge, if I may be heard then. We would argue we’re entitled to notice on these motions. As far as the Complaint that was just filed, we just received that. We’ve prepared for trial and proceeded on the fact that is (sic) says DUI on the citation, which is all we were provided with.”, (*Davidson*, (supra), cited during the argument). “So Judge, we’re going to object to this being heard. We were not placed on proper notice of this Complaint, and we were not placed on proper notice of this Motion in Limine, and the jury is on the way in. So if

---

<sup>1</sup> Though not conceding an expert witness is necessary, had Tomlinson had notice that the state would be allowed to proceed on the per se theory, and expert could have been utilized.

the Court is going to hear this Motion in Limine, we're going to request a continuance."

The Court denied the request for continuance and proceeded to hearing.

Tomlinson prepared for trial and was on notice that the charge was an impairment DUI up to and including the morning of trial. Unless and until the Court granted the Motion in Limine, per se DUI was not an issue. A defendant should not have to guess or speculate when preparing a defense, and when preparing to argue a Motion in Limine. The case law is clear; the Court violated due process<sup>2</sup> by hearing the Motion at all, and abused its discretion by not granting the requested continuance.

B. Tomlinson denied due process of law by the Court's erroneous rulings in matters of law and evidence.

The state argued, and the Court erroneously ruled that *State v. Stutliff*, 97 Idaho 523, 547 P.2d 1128 (Idaho 1976), stood for the proposition that Tomlinson was precluded from presenting any evidence of margin of error on the LifeLoc, ascending descending BAC, results of field sobriety tests, i.e., any evidence of impairment, (Tr p 101, ll 6-25, p 102, ll 1-25, p 103, ll 1-22). The Court in this case utilized *Stutliff* and held that the state did not have to extrapolate the BAC back to the time of the stop, (when the defendant was last driving), and any evidence goes to weight instead of admissibility, (Tr p 102, ll 9-14). Evidence that goes to weight versus admissibility is relevant evidence, and Tomlinson should have been able to present said evidence under the Court's own ruling.<sup>3</sup>

---

<sup>2</sup> "Due process requires an opportunity upon reasonable notice for a fair hearing before an impartial tribunal.", *Miller v St Alphonsus Reg'l Med. Ctr.* 139 Idaho 825 (2004).

<sup>3</sup> Idaho Rule of Evidence, ("IRE"), 401, 402. See also *Stutliff*, at page 524, "The lapse of time prior to the extraction of samples goes to the weight to be afforded the test results and not to their admissibility." If evidence is relevant, the defendant has a due process right to present said evidence to the jury. See also RIGHT TO PRESENT A DEFENSE footnote, (supra).

The Court and the state misinterpreted and misapplied *Stutliff*. In that case, the district ruled that the BAC was inadmissible because the state did not have a witness to extrapolate the level back to the time of the stop:

“We hold that this statute does not require extrapolation back but establishes that the percentage of blood alcohol as shown by chemical analysis relates back to the time of the alleged offense for purposes of applying the statutory presumption. This holding is in accord with those of other jurisdictions who have considered the question. *Jackson v. City of Roanoke*, 210 Va. 659, 173 S.E.2d 836(1970); see also *State v. Kohlasch*, 11 Or.App. 459, 502 P.2d 1158 (1972). A contrary result could defeat the statute entirely since an extrapolation, particularly to a period prior to defendant's 'peak' period, would often be based solely on the defendant's own testimony as to the amount of alcohol ingested, the period of time over which it was ingested and the time of the last consumption of alcohol. Indeed, should the defendant feel that his blood alcohol level was lower at the time of the alleged offense, the statute specifically provides for 'the introduction of any other competent evidence bearing upon the question whether or not the defendant was under the influence of intoxicating beverages.' I.C. § 49-1102(b)4. This section entitles either party to produce a witness capable of extrapolating the results to a prior period of time. The burden, however, is on the party who seeks to introduce this evidence.” (*Stutliff*, p 525).

*Stutliff* does not preclude a defendant from presenting evidence of BAC level at the time of driving; it places the burden on the party seeking to prove the matter. Further, the language, “We hold that this statute does not require extrapolation back but establishes that the percentage of blood alcohol as shown by chemical analysis relates back to the time of the alleged offense for purposes of applying the statutory presumption”, *Sutliff*, supra), is dispositive of this issue. A jury must consider all evidence that is admitted, and the rules of evidence do not distinguish between evidence from a witness on direct or cross examination. Idaho Rule of Evidence 401: “Relevant Evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Since the state has the burden of proof, the defendant need not put on any

evidence. A defendant is allowed to make his/her entire case through cross-examination of the state's witnesses. The state elicited evidence of the BAC level, so the accuracy of the level is placed at issue. The state placed evidence in front of the jury about performance checks, LifeLoc maintenance, absorption in the body of alcohol, time frames between the cessation of driving and the time of the BAC test, et al.

In *State v. Edmondson*, 125 Idaho 132, 867 P.2d 1006 (Idaho App. 1994), the court held:

“A defendant charged with driving under the influence by proof of excessive alcohol content is entitled to offer any competent evidence tending to impeach the results of the evidentiary tests admitted against him. See *State v. Clark*, 286 Or. 33, 593 P.2d 123, 128 (1979); *State v. Gates*, 7 Haw.App. 440, 777 P.2d 717, 720-21 (1989). Thus, a defendant may introduce evidence of his blood alcohol content, or other direct or circumstantial evidence, to show a disparity between such evidence and the results produced by the chemical testing, so as to give rise to an inference that the prosecution's test results were defective. See *State v. Clark*, 593 P.2d at 126-27; *State v. Keller*, 36 Wash.App. 110, 672 P.2d 412 (1983).”

In this case, Tomlinson was precluded from introducing this evidence by the Court's erroneous rulings.

In *State v. Robinett*, 141 Idaho 110, 106 P.3d 436 (Idaho 2005), the court held:

“ We hold today that a numerical BAC test result is relevant to a prosecution for driving under the influence (as opposed to a per se violation) only if a proper foundation is laid to assure the validity of the test result, including evidence extrapolating the result back to the time of the alleged offense.”

A defendant is allowed to place the issue in front of the jury regardless of the state's decision to proceed on a per se basis.

Frederick testified he was familiar with the evidentiary concept of ascending/descending blood levels, (Tr p 97, 1-5). The state objected to this line of

questioning, the jury was sent out, and the parties argued the issue. The state argues that Fredrick is not competent to testify about ascending/descending BAC. Fredrick testified he was POST certified, a breath testing specialist, (in addition to a certified operator), on the LifeLoc, had administered hundreds of the tests, (Tr p 33, ll 10-25), and conducted approximately five hundred DUI investigations, (Tr p 28, ll 8-10). Tomlinson was not allowed to attempt to lay the foundation for Fredrick's competency even after Fredrick testified he was familiar with the ascending/descending BAC. Ascending/descending BAC is covered in POST training, and Fredrick testified knowledgeably for some three pages in the transcript about the pyloric valve and alcohol's journey through the body, (Tr p 89-92).

The state cannot limit a defendant's ability to put on a defense by the manner in which it decides to charge a crime- impairment versus per se.<sup>4</sup> The state objected to the defendant eliciting testimony about FST's, (Tr p 80, ll 21-23). Tomlinson correctly argued that the state had "opened the door" to said testimony by the officer's testimony about the investigation, that the BAC at the time of driving, (forty-five minutes prior to the blow), was relevant, the defendant has a due process right to present a case, a relevant issue is whether the reading was accurate, further relevance lies in the fact the purported BAC readings were close to the legal limit, (.083, .082), and there is an acknowledged margin of error in the LifeLoc, (Tr p 81, ll 1-25, p 82, ll 1-15).

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<sup>4</sup> RIGHT TO PRESENT A DEFENSE: The constitutional right to present a complete and meaningful defense is grounded in the 6<sup>th</sup> Amendment Compulsory Process Clause or Confrontation Clause, and the Due Process Clause of the 14<sup>th</sup> Amendment, which includes the right to offer testimony of witnesses, to cross-examine, and to present the defendant's version of the facts. The defendant argues that few rights are more fundamental than that of a full and fair opportunity to cross-examine a witness, and present evidence through cross-examination. Evidentiary rules cannot trump the right to present a defense, *Lunbery v Hornbeak*, 605 F. 3d 754 (9<sup>th</sup> Cir. 2010).

This Court need to look no further than the DUI statute and the DUI jury instruction to decide this issue. Idaho Code 18-8004 at (1)(a) reads as follows: “It is unlawful for any person who is under the influence of alcohol, drugs or any other intoxicating substances, or any combination of alcohol, drugs and/or any other intoxicating substances, or who has an alcohol concentration of 0.08, as defined in subsection (4) of this section, or more, as shown by analysis of his blood, urine, or breath, to drive or be in actual physical control of a motor vehicle within this state, whether upon a highway, street or bridge, or upon public or private property open to the public.”, (emphasis the author’s).

The jury instruction for DUI given in this case reads in pertinent part as follows: In order for the defendant to be found guilty of Driving Under the Influence the state must prove each of the following:

1. On or about September 26, 2012
2. in the state of Idaho
3. the defendant, Wade Tomlinson, drove
4. a motor vehicle
5. upon a highway, street or bridge or upon public or private property open to the public
6. while having an alcohol concentration of .08 or more as shown by analysis of the defendant’s breath., (emphasis added).

The verbiage in the statute and jury instruction define the offense, it is a violation of due process for Tomlinson not to be able to enter evidence challenging the elements of the crime for which he is charged.

The state utilized *Elias-Cruz v. Idaho Dept. of Transp.*, 153 Idaho 200, 280 P.3d 703 (Idaho 2012), ad nauseam in their brief for the proposition that a BAC over the limit at the time of testing is dispositive of the issue. *Elias* was a civil case concerning an administrative license suspension. The burden of proof is not beyond a reasonable doubt as in a criminal case. Tomlinson argues the holding in *Elias* should be overturned if

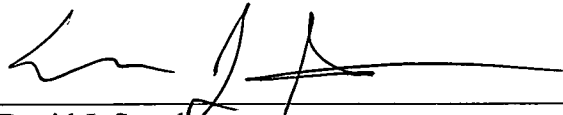


applied to criminal prosecutions. Egs.: “There is no constitutional right to drive with alcohol in one's system.” Tomlinson argues that there are statutes setting what this limit is- .08 or higher. “In essence, we held that the driver took the risk that the concentration of alcohol in his blood at the time of testing would be greater than it was when he was actually driving an hour earlier.” This holding applied in a criminal action defies law and logic- the statute is clear and unequivocal that the relevant BAC is while driving. The “took the risk” language in a criminal context is fallacious, a citizen is either in violation of the law or he is not, and due process requires notice of what said violation of the law is. In a criminal case, the state has the burden of proof, unlike in *Elias* when said burden was on the petitioner.

The state entered the BAC printout into evidence over Tomlinson’s objection, (Tr p 61, ll 1-25). Tomlinson objected as the BAC is a police report prohibited under IRE 803(6)(A), the state responded the report was allowed in under the statute. The Judge erroneously ruled that the printout came in. The rule and statute are in conflict, when a conflict exists between a rule and statute, the rule controls, (Tr p 61, ll 18-24) The jury should not have had the BAC readout in the jury room..

#### IV. CONCLUSION

Tomlinson requests the jury’s finding of guilt be vacated, and the case remanded for a new trial. The defendant should receive his due process right to be heard on the issue of per se DUI prosecution, and be allowed to present a complete and meaningful defense.



David J. Smethers  
Attorney at Law

11-4-13  
Date

CERTIFICATE OF SERVICE: This certifies that a true and correct copy of the


above and forgoing instrument was: ☐ Mailed; ☐ Faxed; ☐ Hand Delivered, to:

☐ Ada County Prosecutor;

☐ Boise County Prosecutor;

☒ Boise City Prosecutor;

\_\_\_\_\_  
Dated this 11 day of Nov, 2013

  
David J. Smethers

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NO. 346  
A.M. 2 P.M.

DEC 02 2013

CHRISTOPHER D. RICH, Clerk  
By MAURA OLSON  
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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ORIGINAL

STATE OF IDAHO,	)	
	)	
Plaintiff/Respondent,	)	Case No. CR-MD-2012-0014306
	)	
vs.	)	
	)	
WADE ALLEN TOMLINSON,	)	<b>RESPONDENT'S BRIEF</b>
	)	
Defendant/Appellant.	)	
	)	

APPEAL FROM THE MAGISTRATE COURT OF THE FOURTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE JOHN HAWLEY, MAGISTRATE, PRESIDING

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**COMES NOW**, the Respondent by and through Brenda M. Bauges, Assistant City Attorney, and hereby files its Respondent's Brief in the above-captioned matter.

### **STATEMENT OF THE CASE**

#### Nature of the Case

Wade Tomlinson ("Tomlinson") appeals from the entering of a withheld judgment, following a jury trial, for driving under the influence (DUI).

#### Course of Proceedings and Disposition

Tomlinson was charged with driving under the influence in the underlying case. At a pre-trial conference held on November 19, 2012, the case was set for jury trial to be held on December 13, 2012. (R. 95, Trial Status Mem. dated November 19, 2012.)<sup>1</sup> On December 7, 2012, the State disclosed its sworn complaint to Tomlinson, indicating that it would file that complaint the day of trial. (R. 93-94, Suppl. Resp. to Req. for Disc. dated December 6, 2012.) Upon Tomlinson's request, on the day of trial, the trial was rescheduled due to a scheduling conflict of defense counsel. (R. 90, Pretrial Mem. and Minute Entry dated December 13, 2012.) The trial was rescheduled for February 12, 2013. (R. 90, Pretrial Mem. and Minute Entry dated December 13, 2012.) Thereafter, Tomlinson requested and received a second continuance on January 11, 2013, setting the trial out to March 26, 2013. (R. 87, Mot. to Vacate and Re-set Jury Trial dated January 6, 2013; R. 85, Ord. Vacating and Re-setting Jury Trial.) On January 18, 2013, the State disclosed an alternative sworn complaint to Tomlinson, which contained language alleging only a *per se* violation of the DUI statute, again indicating that it would file this complaint the day of trial. (R. 82-83, Suppl. Resp. to Req. for Disc. dated January 18, 2013.)

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<sup>1</sup> Record citation numbers refer to the consecutive pagination of the trial court record, on file with the Ada County Clerk's office. The page count starts at "1" with the document after the Notice of Appeal.



The State subsequently filed a Motion in Limine on March 4, 2013, three weeks prior to the March trial date, asking the trial court to exclude certain evidence that would be irrelevant for a *per se* DUI prosecution. (R. 69-73, Mot. in Limine dated March 1, 2013.)

The day before the March trial date, Tomlinson asked for a third continuance of the jury trial. (R. 67-68, Second Mot. to Continue Jury Trial dated March 25, 2013.) The continuance was based on Tomlinson being unprepared for trial, despite the three month extension previously granted to Tomlinson. (R. 66, Magistrate Mins./Not. of Hr'g dated March 26, 2013.) The court granted Tomlinson's motion on the day of trial, indicating, however, that it was going to entertain a motion for witness costs by the State and would likely award those costs. (R. 66, Magistrate Mins/Not, of Hr'g dated March 26, 2013; Tr., p. 11, L. 19 – p. 12, L. 9.) The court also told the State's prosecutor and defense counsel that it would hear argument on the State's motion in limine on the morning of the new jury trial day. (Tr., p. 11, L. 1 – p. 12, L.9.) The court thereafter awarded the State costs based on Tomlinson's late request for continuance. (R. 54-57, Ord. Awarding Costs Against Def. dated April 15, 2013; R. 59-60 Ord. for Reimbursement of Costs of Prosecution dated April 9, 2013.)

The jury trial was eventually held on April 17, 2013. (R. 23, Verdict dated April 17, 2013.) At this point the original complaint had been disclosed to Tomlinson for a little over four months and the alternative complaint, alleging solely a *per se* DUI violation, had been disclosed to Tomlinson for one day shy of three months. (R. 93-94, Suppl. Resp. to Req. for Disc. dated December 6, 2012; R. 82-83, Suppl. Resp. to Req. for Disc. dated January 18, 2013.) As the State indicated in those disclosures, it filed its chosen complaint the morning of the jury trial in conformance with the trial status memorandum—which required the complaint to be prepared

one week prior to trial, not filed one week prior. (R. 95, Trial Status Mem. dated November 19, 2012; Tr., p. 5, L. 10 – p. 7, L. 7.)

The parties argued the State's written motion in limine, but the court stated that it would not rule prior to trial on the evidentiary issues raised. (Tr., p. 12, L. 13 – p. 18, L. 4.) At that point, the State sought a ruling clarifying the inadmissibility of impairment evidence in a *per se* DUI prosecution, pursuant to existing case-law. (Tr., p. 18, L. 5 – p. 19, L. 10.) The State provided courtesy copies of a case on point to both the trial court and Tomlinson. (Tr., p. 18, L. 5 – p. 19, L. 16.) The court again deferred making a ruling until the evidentiary issues arose, if at all, during trial. (Tr., p. 19, L. 17 – p. 21, L. 3.) During the trial, these evidentiary issues arose and the trial court excluded impairment evidence and rising blood alcohol content (BAC) evidence. (Tr., p. 79, L. 11 – p. 86, L. 13; p. 97, L. 1 – p. 104, L. 2.) The jury found Tomlinson guilty of DUI. (Tr., p. 168, Ls. 3-19.)

Tomlinson was sentenced on May 13, 2013, at which time the trial court entered a withheld judgment. (R. 10, Withheld J. dated May 13, 2013; Register of Actions.) Tomlinson now appeals from the entry of the withheld judgment, alleging numerous errors during the course of the jury trial.

#### Statement of the Facts

On September 26, 2012, at approximately 10:45 p.m., Tomlinson was driving in the area of Grove Street and Fifth Street in Boise, Idaho. (Tr., p. 28, Ls. 18-25; p. 29, L. 7 – p. 30, L. 24.) Officer David Frederick of the Boise City Police Department, observed Tomlinson's vehicle cross over a double yellow lane divider as it was making a right turn onto Grove Street and then make a wide left turn onto Front Street. (Tr., p. 29, L. 12 – p. 30, L. 3.) Officer Frederick

initiated a traffic stop based on these infractions. *Id.* During Officer Frederick's contact with Tomlinson, he could smell the odor of an alcoholic beverage coming from inside the vehicle and Tomlinson admitted to drinking three beers prior to driving. (Tr., p. 31, Ls. 2-15.) Ultimately, Tomlinson took a breath alcohol concentration (BrAC) test that resulted in a BrAC above the legal limit. (Tr., p. 56, Ls. 8-11; p. 59, Ls. 5-9; p. 66, Ls. 5-9.) Specifically, BrAC readings of 0.083 and 0.082. *Id.* The testing instrument was certified and working properly, and Officer Frederick followed all standard procedures for administering the test. (Tr., p. 32, L. 3 – p. 58, L. 17.) Tomlinson was arrested and charged with DUI by citation. (Tr., p. 66, Ls. 20-21; R. 14, Idaho Uniform Citation 1481950.)

#### **RESTATEMENT OF THE ISSUES ON APPEAL**

1. Tomlinson phrases the first issue as:

“Should Tomlinson's request for a continuance been granted at the time the state filed the formal COMPLAINT on the morning of jury trial?”

Based on Tomlinson's arguments, it appears there are in fact two separate bases upon which Tomlinson alleges error in denying his motion to continue the jury trial. The State thus rephrases this issue as:

“Did the trial court abuse its discretion in denying Tomlinson's request for a continuance based on the State filing its complaint the morning of jury trial or, alternatively, based on a lack of calendaring a hearing on the State's motion in limine prior to the morning of trial?”

2. Tomlinson phrases the second issue as:

“Was Tomlinson denied due process of law by the Court's erroneous rulings in matters of law and evidence?”

Based on the substance of Tomlinson's arguments, the State rephrases this issue as:

"Did the trial court err when it excluded evidence of rising BAC and field sobriety tests, and admitted the BAC print-out."

### ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING TOMLINSON'S REQUEST FOR A CONTINUANCE BECAUSE TOMLINSON HAD NOTICE OF THE COMPLAINT, NOTICE OF THE HEARING ON THE MOTION IN LIMINE, AND NOTICE OF THE POTENTIAL FOR A PER SE DUI PROSECUTION.

An appellate court will review a trial court's decision to grant or deny a motion for continuance under an abuse of discretion standard. *State v. Harshbarger*, 139 Idaho 287, 291, 77 P.3d 976, 980 (Ct. App. 2003). A trial court does not abuse its discretion when it correctly identifies the issue as discretionary, acts within the boundaries of its discretion and consistently with applicable legal standards, and reaches its decision by an exercise of reason. *Id.* "To warrant a reversal, a defendant must show that his substantial rights were prejudiced by the denial." *Id.*

1. The State was not Required to File the Complaint Prior to Trial and Tomlinson had Ample Notice of the Complaint and the Potential for a Per Se DUI Prosecution.

A court may allow an amendment to a charging document any time prior to the prosecution resting its case, even if an additional or different offense is charged so long as substantial rights of the defendant are not prejudiced. Misdemeanor Criminal Rule 3(d); *State v. Banks*, 113 Idaho 54, 56, 740 P.2d 1039, 1041 (Ct. App. 1987). If an amendment is made, the court has the discretion to grant a continuance if good cause is shown. Misdemeanor Criminal Rule 3(d). In *Banks*, the trial court allowed the State to amend a forcible rape charge during trial

but before the State had rested its case. *Banks*, 113 Idaho at 56, 740 P.2d at 1041. The amendment added the victim's age, thus allowing an alternative charge for statutory rape. *Id.* The defendant moved for a continuance, which was denied. *Id.* The jury found the defendant guilty of statutory rape and the defendant appealed. *Id.* The defendant argued that this amendment during trial prejudiced his substantial rights because he was deprived of the ability to prepare for the charge of statutory rape versus forcible rape. *Id.* Part of his argument was that his defense necessarily focused on the consent element as opposed to the sexual intercourse element and would have been different had he had the ability to prepare for the alternative charge. *Id.* at 56-57, 740 P.2d at 1041-42. The Court of Appeals rejected this argument. It reasoned that the defendant bears the burden of showing prejudice arising from an amendment, and the defendant was not able to do so in that case. *Id.* at 57-60, 740 P.2d at 1042-45. Specifically, the Court held that the defendant had prior knowledge of the victim's age, was unable to detail how the amendment materially impaired his defense as opposed to just generally stating that it did, and the Court offered to permit the defendant to recall the victim to mitigate. *Id.* at 60, 740 P.2d at 1045.

In this case, the State was only required to *prepare* a formal complaint no later than a week prior to trial. (R. 95, Trial Status Mem. dated November 19, 2012.) The State did in fact prepare and disclose the complaint used at trial almost three months prior to the actual jury trial date. (R. 82-83, Suppl. Resp. to Req. for Disc. dated January 18, 2013.) That the State filed the complaint the day of trial, as was its stated intention disclosed to Tomlinson three months prior to trial, does not violate the letter or intent of the Pre-Trial Status Memorandum's terms. The complaint was prepared and disclosed well in advance of the one-week-prior-to-trial deadline

imposed on the Pre-Trial Status Memorandum. The presumable purpose of such deadline is to give Tomlinson notice of the charging document in advance of trial. By giving Tomlinson three months to prepare, the State fulfilled this intended purpose.

Tomlinson characterizes the filing of the State's formal complaint as an "amendment" to the charging document. (Mem. in Supp. of Appeal p. 3.) This is not accurate. The State's charging document prior to the morning of trial was a citation as no formal complaint had been filed. (R. 14, Idaho Uniform Citation 1481950.) The citation simply states that Tomlinson is charged with "DUI" in violation of "18-8004." (R. 14, Idaho Uniform Citation 1481950.) A formal complaint does not amend such a generalized document, it merely states the specific language contained in the statute. The State at no time disclosed—or ultimately filed—a formal complaint that alleged language not contained in Idaho Code § 18-8004. Thus, at no time did the State amend the charging document. As such, Tomlinson could not have been prejudiced, being put on notice of a violation of the language contained in Idaho Code § 18-8004 since the time of his arrest, over six months prior to trial. As Tomlinson was not prejudiced, the trial court exercised reason in determining no good cause existed to continue the trial and did not offend applicable legal standards in denying the motion to continue.

Even if the Court were to determine that the formal complaint was an amendment to the original charging document, the citation, the trial court still acted consistently with applicable legal standards and did not abuse its discretion in denying the continuance. The State's first proposed formal complaint, disclosed to Tomlinson four months prior to trial, simply tracked the language of Idaho Code § 18-8004 which states:

It is unlawful for any person who is under the influence of alcohol, drugs, or any other intoxicating substances, or any combination of alcohol, drugs and/or any

other intoxicating substances, or who has an alcohol concentration of .08 . . . as shown by analysis of his blood, urine, or breath, to drive or be in actual physical control of a motor vehicle within this state, whether upon a highway, street, or bridge, or upon public or private property open to the public.

Idaho Code § 18-8004(1)(a). This language put Tomlinson on notice that the State was planning on proceeding under two alternative theories. The language prohibiting “any person who is under the influence . . .” indicates an impairment theory, that is, the State would not have to show a specific BAC or BrAC, the State could simply show Tomlinson was under the influence of intoxicants such that his driving ability was impaired. The language prohibiting a person from driving “who has an alcohol concentration of .08” is a *per se* violation of the statute. That is, the State only has to prove that the test result was above a .08 in order to prove a violation of the statute. Thus, even four months prior to trial, Tomlinson was on notice that at least one theory of the State’s would be a *per se* theory. If Tomlinson truly “prepared for trial based on the citation issued the night of the incident” (Mem. in Supp. of Appeal p. 3), he would have been prepared for both theories.

Thereafter, three months prior to trial, the State disclosed to Tomlinson an alternative complaint, which contained only the *per se* theory language. At this point, Tomlinson was on notice that the State may proceed solely under a *per se* theory. If there was any doubt, the State subsequently filed a motion in limine, a month and a half prior to trial, asking the trial court to exclude evidence not relevant in an exclusively *per se* DUI prosecution. Tomlinson could have had no doubt at that point that the State intended to proceed on a *per se* basis.

These circumstances are even less prejudicial than those discussed in *Banks*, cited above, where the Court upheld an amendment to the actual charge, from forcible rape to statutory rape, in the middle of trial. In this case, Tomlinson was aware well in advance of trial and the State

did not amend the charge itself, simply the legal theory upon which it intended to prove its case. Tomlinson argues, as did the defendant in *Banks*, that had Tomlinson known of the *per se* violation Tomlinson would have prepared differently, including potentially hiring an expert. The argument in *Banks* was rejected because the Court found the defendant had knowledge of the factual basis of the new charge prior to trial. The same is true in this case; Tomlinson had notice of the factual basis and indeed, as illustrated by the record, had notice of the “new” charge itself. That Tomlinson did not take this knowledge, gained three months prior to trial, and attempt to hire an expert at that point knowing the State’s intention to proceed on a *per se* basis, belies the argument that Tomlinson would have hired an expert. If the circumstances of *Banks* do not result in reversible prejudice to Tomlinson, the circumstances here do not result in reversible prejudice. The trial court did not abuse its discretion as it acted consistently with applicable legal standards and reached its decision by an exercise of reason.

2. Tomlinson had Ample Notice of the Motion in Limine and That the Hearing Would be Held the Morning of Trial.

Although a pre-trial motion generally must be in writing, the trial court may permit such a motion to be made orally. Idaho Criminal Rule 47. Trial courts are authorized to excuse any lack of time deadline compliance set out in Idaho Criminal Rule 45(c). *State v. Jolley*, No. 37374, 2011 WL 11037818, at \*3 (Ct. App. 2011). Idaho Criminal Rule 45(c) only applies to written motions, which must be served no later than seven days before the time specified for the hearing, along with a notice of hearing, but is silent on oral motions. As stated in *Jolley*, however, these rules bind the parties not the trial court; if a party wants a hearing on a written motion it is responsible for noticing the hearing or runs the risk of not having oral arguments on



the motion. *See id.* Thus, whether the trial court decides to hear argument on the motion, rule on the issue based solely on the briefing, or decline to hear the motion at all, is within its discretion. Furthermore, a trial court may in its discretion decide “that it is inappropriate to rule in advance on the admissibility of evidence based on a motion *in limine*, but may defer [ ] ruling until the case unfolds and there is a better record upon which to make his decision.” *State v. Hester*, 114 Idaho 688, 689-700, 760 P.2d 27, 38-39 (1988).

In this case, the State’s written and oral motions were properly heard by the trial court the morning of trial. The State made one written motion to exclude evidence not relevant for a *per se* DUI prosecution and one oral argument to exclude evidence not relevant for a *per se* DUI prosecution. The Idaho Criminal Rules do not contain a hearing or notice requirement for oral motions made by permission of the trial court. Therefore, there is no basis upon which Tomlinson can claim the trial court erred in hearing the State’s oral motion on the morning of trial.

Though Idaho Criminal Rule 45(c) contains language indicating that if the State desires a hearing on its written motion, it must serve notice for such, as *Jolley* states, those rules bind the parties and not the trial court. I.C.R. 45(c) is not violated by the court’s discretionary hearing of the State’s written motion on the morning of trial. The trial court could have similarly reached the merits of the motion based solely on the briefing. That Tomlinson chose not to respond to a motion it had 43 days’ notice of, cannot be attributable to the State and does not render a denial of a continuance motion an error. Tomlinson knew the State had not served a notice of hearing different from the jury trial date, Tomlinson knew of the State’s motion and intent on asking the trial court to make an evidentiary ruling prior to trial, and Tomlinson chose based on this

knowledge to not file a written response. In these circumstances, it was actually a benefit to Tomlinson that the trial court held a hearing on the motion prior to trial, as Tomlinson would not have been heard on the motion in any other way.

Though Tomlinson tries to argue that *Davidson v. Beco Corp.*, 112 Idaho 560, 733 P.2d 781 (Ct. App. 1986), *overruled on other grounds by Davidson v. Beco Corp.*, 114 Idaho 107, 753 P.2d 1253 (1987) stands for the proposition that the trial court should have had a hearing prior to the trial date, nowhere in that case does the Court indicate this directive. In fact, in a subsequent case, *Hester*, 114 Idaho at 688, 760 P.2d at 27, the Idaho Supreme Court indicates that it is very likely a trial court will not rule on a motion in limine prior to trial because “[i]n short, motions *in limine* seeking advanced rulings on the admissibility of evidence are fraught with problems.” *Id.* at 700, 760 P.2d at 39. The Court specifically stated, “that it is inappropriate to rule in advance on the admissibility of evidence based on a motion *in limine*, but may defer [ ] ruling until the case unfolds and there is a better record upon which to make his decision.” *Id.* Here, in fact, the trial court did defer ruling on the motion until during the trial.

Furthermore, Tomlinson in fact had notice that the trial court intended on holding a hearing on the motion the day of trial. At a conference with the parties and the trial court when Tomlinson asked for a continuance of the March trial date, the trial court told both parties it would take up the State’s motion in limine on the morning of the new trial date. (Tr., p. 11, L. 9 – p. 12, L. 9.) The following discussion was had on the record the morning of trial after Tomlinson indicated to the trial court he had not had notice of the hearing:

MS. BAUGES: The other thing that the State wants to point out is, as far as notice goes, when we spoke in chambers – and – and the Court can put on the record, just in case this comes down the pike, its recollection as well – but my recollection is, in chambers three weeks ago, when we had this set for trial, I had

asked if we were going to take this motion up that day instead of wait for the next trial setting. And you did say, in the presence of both parties, that we were going to take it up right before trial.

And so, I just want to make a record of that discussion that was had three weeks ago, as well. And if the Court wants to put on the record, is that the Court's recollection of the discussion in chambers?

THE COURT: Yeah. I – that was – that was what I stated. I – I typically would not take that up beforehand, so.

MR. SMETHERS: And – and, Judge, if I may then. My recollection of the conversation in chambers was that you would take up the morning of trial about the State's request for costs of witnesses for the last defense continuance.

THE COURT: No. I said I was going to entertain – I would entertain a motion for costs and I was likely to award those. So, I – that's not what I said there.

(Tr., p. 11, L. 9 – p. 12, L. 9.) Because he had actual notice of a hearing on the State's motion, three weeks prior to trial, Tomlinson cannot now claim that it was error for the trial court to deny his request for continuance on the basis that he was deprived of notice of the hearing.

### 3. Any Error in Denying the Continuance was Harmless.

Even if the Court were to find that the trial court violated applicable rules when it denied Tomlinson's motion to continue, any error which does not affect substantial rights shall be disregarded. Idaho Criminal Rule 52.

Because Tomlinson had actual notice that the State would be proceeding on a *per se* theory and that the trial court would be hearing the State's motion on the morning of trial, the denial of the continuance did not affect substantial rights of Tomlinson.

**B. THE TRIAL COURT DID NOT ERR IN EXCLUDING EVIDENCE OF RISING BAC AND FIELD SOBRIETY TESTS, AND ADMITTING THE BAC PRINT-OUT.**

Though a trial court has broad discretion in determining whether to admit or exclude evidence, whether evidence is relevant is a question of law. *State v. Joy*, 155 Idaho 1, \_\_\_, 304 P.3d 276, 281 (2013). An appellate court reviews questions of law *de novo*. *Id.* Even where evidence is admitted or excluded in error, however, appellate courts will only grant relief if the error affects a substantial right of one of the parties. *Id.*

1. Because Rising BAC Evidence is Irrelevant in a *Per Se* DUI Prosecution, and Tomlinson had no Witness Competent to Testify to such at Trial, the Trial Court did not Err in Excluding this Evidence.

The State's motion in limine relied heavily on the principles recently adopted by the Idaho Supreme Court in *Elias-Cruz v. Idaho Dep't of Transp.*, 153 Idaho 200, 280 P.3d 703 (2012). Though *Elias-Cruz* arose in the context of a license suspension hearing, which has a different standard of proof than the criminal context, as discussed more fully below, the principles relied upon by the State were legal conclusions derived from the Idaho Supreme Court from criminal case law and an analysis of the criminal DUI statute, thereby applying in the criminal context. The trial court did not err in excluding measurement of uncertainty and rising BAC evidence because such evidence is irrelevant to whether there has been a *per se* violation of Idaho Code § 18-8004. Irrelevant evidence is inadmissible pursuant to Idaho Rule of Evidence 402.

The Idaho Supreme Court has recently held that in the *per se* context, "the actual alcohol concentration in the driver's blood is no longer the standard" and therefore a "testing machine's margin of error is irrelevant." *Elias-Cruz*, 153 Idaho at 205-06, 280 P.3d at 708-09. The

conclusion that the only question in a *per se* violation of Idaho Code § 18-8004 is whether or not the test results showed a concentration at or above the legal limit, was based in part on the Court's examination of the evolution of Idaho Code criminalizing driving under the influence (DUI) and criminal case law. *Id.* at 706-709.

As pointed out by the Court, the legislature created only a presumption of intoxication in 1970 with its criminal DUI law. *Id.* at 706. The Court then examined the implications of a presumption as opposed to a *per se* violation by citing a criminal case, not a license suspension case. *Id.* In that case, the question for the Court was whether the State needed to prove back-extrapolation for a breath test to be admissible in the criminal context, given the argument of rising BAC. *State v. Sutliff*, 97 Idaho 523, 524-25, 547 P.2d 1128, 1129-30 (1976). The Court held that the State did not. *Id.* The Court found that the test results "relate[] back to the time of the alleged offense for purposes of applying the statutory presumption." *Id.* at 525, 547 P.2d at 1130. A defendant could introduce evidence of back-extrapolation to argue rising BAC as the 1970 statute specifically provided for "the introduction of any other competent evidence bearing upon the question of whether or not the defendant was under the influence of intoxicating beverages." *Id.* (quoting then-Idaho Code § 49-1102(b)(4)). In this rebuttable presumption context, such evidence went to the weight of the test results, not their admissibility. *Id.* at 524, 547 P.2d at 1129. It is worthy of note that the Court found the defendant could introduce evidence of back-extrapolation where the statute specifically provided for "other competent evidence," and no such similar language appears in the post-1984 statute except in cases of refusal and where the test was unreliable or is inadmissible. See Ch. 9, § 2, 1970 Idaho Sess. Laws 15, 16; Idaho Code §§ 18-8004(2) & 18-8004(4).

When the legislature enacted the 1984 DUI laws, however, it changed the significance of the tests results for BAC as they “no longer created merely a presumption of intoxication [but] . . . could be used to establish a *per se* violation of the statute.” *Elias-Cruz*, 153 Idaho at 203, 280 P.3d at 706. Post-1984, the State can prove a defendant was DUI by showing under the totality of the evidence that the defendant was DUI *or* establish that the defendant drove with an alcohol concentration at or above the legal limit. *Id.* When electing to proceed under the latter *per se* method, “the question is what the alcohol level was at the time the sample was taken.” *Id.* “[T]here no longer need[s] to be a determination of alcohol concentration in the blood to prove a *per se* violation. Such violation [can] be established simply by the test results.” *Id.* at 707. This shift in focus from actual alcohol concentration in the blood to simply what the test results show is further illustrated by the deletion of any reference to an evidentiary test being a “determination of the percent by weight of alcohol in blood.” *Id.* at 707. The Idaho Supreme Court summed up this shift in the criminal statute and case law in the following manner:

Thus, after the 1987 amendment, a *per se* violation of the statute no longer need be based upon showing “a determination of the percent by weight of alcohol concentration in blood.” . . .

After the 1987 amendment, a violation can be shown simply by the results of a test for alcohol concentration that complies with the statutory requirements. With that change, the margin of error in the testing equipment is irrelevant. The equipment need not precisely measure the alcohol concentration in the person’s blood. The test need only be based upon the correct formula, and the equipment must be properly approved and certified.

. . . . When the statute declared it a crime for a person to drive a motor vehicle with “alcohol in his blood” greater than a specified amount, *we did not require the State to establish the precise amount of alcohol in the driver’s blood at the time of driving, even though we knew that the alcohol concentration in the driver’s blood at the time of driving could be lower than at the time of testing. In essence, we held that the driver took the risk that the concentration of alcohol in his blood at the time of testing would be greater than it was when he was actually driving an hour earlier. After the 1987 amendments, the standard is no longer the*

*concentration of alcohol in the driver's blood. It is simply the alcohol concentration shown by an approved and properly administered test of the driver's breath, blood, or urine.* Because the actual alcohol concentration in the driver's blood is no longer the standard, the testing machine's margin of error is irrelevant.

*Id.* at 707-09 (citations omitted, emphasis added).

Although the Court explicitly discusses only the margin of error's relevance, its logic applies to rising BAC evidence as well, especially as the Court cites rising BAC cases in support of its conclusion. This is true regardless of the Court quoting *State v. Robinett*, 141 Idaho 110, 106 P.3d 436 (2005), which quotes the *Sutliff* language that back-extrapolation goes to the weight not the admissibility of test results, because from the remainder of the Court's analysis it does not logically follow that this can still be the standard. If actual alcohol concentration in the driver's blood is no longer the standard--and it does not matter if the test results differ from what the actual blood alcohol content was at the time of driving as it is simply the test results that show a *per se* violation--it follows then that any discussion of back-extrapolation would be entirely irrelevant to whether or not the defendant's BAC tests showed a percentage of alcohol at or above the legal limit. Additionally, that language from *Sutliff* was based on the Court's determination that the statute at the time allowed for such "other competent evidence" and as stated above, no such language exists in the current statute except in circumstances not relevant to the case at hand.

Though *Elias-Cruz* is an appeal from an administrative license suspension hearing, the above analysis is entirely based in the criminal DUI statutes and criminal cases. The analysis is the Court's legal conclusion regarding whether evidence is relevant to the crime of DUI as charged in the criminal code. As it is a legal conclusion its application does not depend upon the

burden of proof in an administrative license suspension hearing versus a criminal case. Legal conclusions of what would be relevant at trial in a criminal case apply regardless of whether the Court made that determination in an appeal from a trial, or an appeal from a different context.

Therefore, because irrelevant evidence is inadmissible—Idaho Rule of Evidence 402—and because *Elias-Cruz* holds that the only question post-1987 in a *per se* DUI case is whether valid test results show a BAC at or above the legal limit, the trial court did not err in excluding any evidence concerning the measurement of uncertainty or rising BAC. As stated by the Court in *Elias-Cruz*, “There is no due process violation in excluding irrelevant evidence. There is no constitutional right to drive with alcohol in one’s system.”

Aside from the legal basis to exclude the evidence, because Tomlinson was not prepared with an expert who was competent to testify as the measurement of uncertainty or rising BAC, there was no error in excluding this evidence. The trial court’s conclusion that the officer could not testify as to these concepts is supported by the record. The officer consistently testified that though he had been told in training how the instrument worked and basics regarding alcohol absorption, he was not a scientist and could not testify as to specific details of scientific concepts. (Tr., p. 87, L. 3 – p. 97, L. 25.) Over the State’s objection, Tomlinson asked specific questions about alcohol absorption rate, physiological processes of drinking alcohol, and how the breathalyzer instrument worked and the officer consistently gave answers such as the following:

A. I’m not – I’m not a scientist, I’m not a – a – forensics person to know exactly. . . .

But getting into the specifics of how everything works, yes, I’ve – I’ve learned about that. But I’m not – I – I can’t testify as to exactly how – how the whole things works, sir. . . .

... I don’t – I don’t – I couldn’t -- . . . give you an exact wording of how that would be, sir. I – like I said, I’m not a scientist. I don’t know. . . .



...  
I – I don't know. I've – I've never – we've actually done some testing where you put some in there, it will pick up some of that mouth alcohol. That's why that 15 minutes is waited, so that mouth alcohol can dissipate.

But once again, we're getting into numbers of how quickly a body will absorb that alcohol, and I'm – I haven't looked over that stuff, and I'm not a scientist to tell you. I don't know the absorption rate because there's too many physiological factors. Somebody that has a PhD or higher than my – my training could – could testify to that, but I can't testify as to how quickly alcohol – the person's body would absorb alcohol, sir.

Q. Did you cover that in your POST training?

A. We went through – there's – there's averages and estimates, but there's nothing specific. We don't go through math as to the absorption rates.

Q. Do you remember discussing the pyloric valve in your POST training?

A. Yes.

Q. What does the pyloric valve do?

A. It's the part that opens and closes between the stomach and the – and the intestine, depending upon if you have food or not in the system. . . . Yes, I do know a little bit about this, but I'm explaining to you, for asking specifics . . . and times no.

(Tr., p. 87, L. 3 – p. 91, L. 6.) These quotes are just a representative sample of the answers the officer gave to Tomlinson when questioned about the scientific principles Tomlinson tried to admit. The officer consistently testified that he could parrot what he had been told in training, which was basic information, but could not get into any specifics regarding scientific information. Tomlinson could not lay a foundation that this officer had sufficient knowledge of the scientific principles Tomlinson was trying to introduce for the officer to be the witness through which Tomlinson could introduce measurement of uncertainty or rising BAC evidence. Thus, on the additional basis that Tomlinson did not have a witness from which he could introduce this evidence, the evidence was properly excluded.

Even if the Court were to find that an error occurred, any error was harmless. Idaho Rule of Evidence 103 ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected"); *State v. Thompson*, 132 Idaho 628, 636, 977

P.2d 890, 898 (1999) (“The determination of whether a substantial right has been affected hinges on whether it appears from the record that the error contributed to the verdict. An error is harmless if, and only if, the appellate court is able to say, beyond a reasonable doubt, that the jury would have reached the same result absent the error.”). Even if the Court were to have ruled that evidence of rising BAC was relevant in a *per se* prosecution, Tomlinson was not prepared to present such testimony. As indicated above, the officer was not competent to testify as such. Furthermore, Tomlinson never disclosed an expert witness, despite having notice three months prior to trial of the State’s probable intent to proceed on a purely *per se* basis. As Tomlinson could not have presented rising BAC evidence at trial, the Court’s finding that such evidence was inadmissible did not ultimately affect what evidence the jury would have heard, and therefore, the exclusion did not contribute to the ultimate jury verdict. Thus, any error in its exclusion was harmless.

2. Because Tomlinson’s Performance on the Field Sobriety Tests is not Relevant in a Per Se DUI Prosecution, and the State did not Open the Door to Such Evidence, the Trial Court did not Err in Excluding this Evidence.

When the State limits itself to proving a DUI charge solely with evidence showing an alcohol concentration above the legal limit, proof beyond a reasonable doubt that the driver had an alcohol concentration in excess of the legal limit is deemed a *per se* violation of the statute. *State v. Edmondson*, 125 Idaho 132, 135, 867 P.2d 1006, 1009 (Ct. App. 1994). A *per se* violation, “is conclusive, not presumptive, of guilt.” *Id.* As a result, “extent of [a defendant’s] impairment [is] neither an element nor a fact of consequence in the state’s case in chief.” *Id.* A defendant may, however, provide proof of impairment to impeach the *accuracy* of the alcohol

concentration test if the defendant can correlate the physical manifestations of impairment with the alcohol level shown by the results of the breathalyzer instrument. *Id.* Thus:

[E]vidence of impairment is not probative for the purpose of challenging an alcohol concentration test “unless an adequate foundation [is] laid to show a correlation between the alleged blood-alcohol level and the likely manifestation of specific symptoms.” The necessary foundation would ordinarily require expert testimony regarding the reasonably expected symptoms of intoxication of someone with the defendant’s physical characteristics and a breath alcohol content as shown by the [breathalyzer instrument]. Where, as in Edmonson’s case, such foundation is entirely lacking, the evidence of his outward symptoms was not relevant, and therefore inadmissible.

*Id.*

In *Edmondson*, the State moved to exclude evidence of impairment or lack thereof, such as admission of the field-sobriety tests and the audio tape made of the stop, in the State’s *per se* DUI prosecution of the defendant, Mr. Edmonson. The trial court agreed that such evidence was not relevant. The district court on appeal reversed, and the Court of Appeals reversed the district court and upheld the trial court’s holding that such evidence was not relevant. In so doing, the Court of Appeals found that such evidence is not relevant for any purpose in the State’s case-in-chief. Nevertheless, it may be relevant in Tomlinson’s case, but only to challenge the accuracy of the test result and only if Tomlinson can lay a foundation that the physical manifestations of impairment were correlated to a specific blood-alcohol level. The Court noted that this was likely to require expert testimony.

In this case, like the case in *Edmondson*, the State proceeded to prosecute its DUI case on a *per se* basis. Therefore, as the Court said in *Edmondson*, any evidence of physical manifestations of impairment such as the field sobriety tests, were inadmissible in the State’s case-in-chief. Although Tomlinson may have been able to admit such evidence in his case, he

would have had to been able to link the manifestations to an actual blood alcohol content level, and Tomlinson in this case was unable to do so. Tomlinson did not disclose an expert witness, which the Court in *Edmonson* noted would be ordinarily required. Neither could Tomlinson have used the State's officer witness to correlate the physical manifestations with a specific blood alcohol content level. Though the Court did not allow an offer of proof on this issue when the parties argued this objection, it is made clear through subsequent testimony of the officer that he has no particularized or specialized knowledge in the instrument used or alcohol absorption rates that would have allowed Tomlinson to use this witness as an expert to lay the required foundation. (Tr., p. 85, L. 7 – p. 86, L. 15; Tr., p. 87, L. 3 – p. 97, L. 25) (also see quotes above in subsection B.1.). Therefore, such evidence was not relevant in this case and the trial court correctly excluded such evidence.

Additionally, the State did not open the door to such evidence. On direct examination the follow exchange took place between the State and Officer Frederick:

Q. Okay. And did the defendant make any comments to you or admissions to you at that time?

A. I did. [sic] I asked Mr. Tomlinson if he had consumed alcohol earlier in the evening, and he stated that he had. He stated that he was coming from the Piper Pub, and had consumed three beers with his wife and some other friends.

Q. Did you conduct an investigation after this --

A. I did.

Q. -- these statements? Okay. And did you ultimately give the defendant a breath test?

A. Yes, I did.

(Tr., p. 31, Ls. 9-22.) The use of the word "investigation" does not open the door to questions regarding the field sobriety tests. The State never asked Officer Frederick if he gave Tomlinson field sobriety tests; the words "field sobriety tests" were never used. The State never asked Officer Frederick his impression of Tomlinson's level of impairment or for physical

manifestations of impairment. The simple and fleeting use of the word “investigation” does not open the door to a whole area of evidence that was not inquired into on direct examination. As such, the trial court did not err in excluding such evidence.

Even if the Court were to find that an error occurred, any error was harmless. I.R.E. 103; *Thompson, supra*, at 636, 977 P.2d at 898. The State was proceeding on a *per se* basis. Even if the jury were to have heard evidence of impairment, the ultimate issue before the jury was whether or not the test result at the time of testing was over 0.08. As the evidence of the State clearly showed the test result was over the legal limit and Tomlinson did not have an expert through which to make impairment evidence a relevant impeachment of the test result, evidence of impairment would not have contributed to the jury verdict and therefore any error in its exclusion was harmless.

3. The Trial Court did not Err in Admitting the BAC Print-Out as Such Admission is Authorized Pursuant to Idaho Code § 18-8004(4).

Evidence of breath alcohol content test results, including the print-out from the breathalyzer machine, is admissible in a DUI prosecution pursuant to Idaho Code § 18-8004(4). That section states, “Notwithstanding any other provision of law or rule of court, the results of any test for alcohol concentration . . . shall be admissible in any proceeding in this state without the necessity of producing a witness to establish the reliability of the testing procedure for examination.”

In this case, pursuant to Idaho Code § 18-8004(4), the print-out from the breathalyzer machine was admissible. Tomlinson claims that such evidence is excluded by hearsay rules of evidence. This argument fails on appeal as an initial matter because Idaho Code § 18-8004(4)

specifically states that its mandate is “notwithstanding any other provision of law or rule of court.” And even if the Court were to find otherwise, the print-out is not excluded by the hearsay rules cited by Tomlinson. Tomlinson cites “IRE 803(6)(A),” though there is no such evidentiary rule. Idaho Rule of Evidence 803(6) is the “records of regularly conduct activity” *exception* to the hearsay prohibition. That is, if the print-out were to qualify as a record of regularly conducted activity, it would actually qualify as an *exception* to the hearsay exclusion and therefore would be admissible, supporting the trial court’s decision.

It is likely Tomlinson meant Idaho Rule of Evidence 803(8)(A) which states:

The following are not within this exception to the hearsay rule: (A) investigative reports by police and other law enforcement personnel, except when offered by an accused in a criminal case.

Nevertheless, the print-out does not fall within this exclusion. This exclusion prohibits “investigative reports.” The print-out is a printed test result from an inanimate object; it is not a report of observations or facts made by a police officer or other law enforcement personnel. As the print-out is not properly excluded pursuant to the Idaho Evidentiary Rules set forth by Tomlinson and is specifically made admissible by statute, the trial court did not err in allowing its admission into evidence.

Even if the Court were to find that the print-out itself were admitted in error, any such error would be harmless because the jury heard the same evidence verbally from the officer. I.R.E. 103; *Thompson, supra*, at 636, 977 P.2d at 898. Whether or not the jury received the actual print-out, the results of the evidentiary test would ultimately have been admitted regardless and, therefore, the result of trial would have been the same if the print-out had been excluded.

### CONCLUSION

Based upon the above arguments, the Respondent requests the Court to find the trial court did not err in denying Tomlinson's request for a fourth continuance made the morning of trial, or in making any of the evidentiary rulings challenged on appeal.

DATED this 2 day of <sup>December</sup>~~November~~ 2013.

BOISE CITY ATTORNEY'S OFFICE

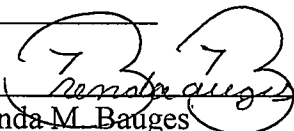
  
Brenda M. Bauges  
Assistant City Attorney

### CERTIFICATE OF SERVICE

I hereby certify that I have on this 2 day of <sup>December</sup>~~November~~ 2013, served the foregoing document on all parties of record as follows:

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DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT IN AND FOR  
THE COUNTY OF ADA

STATE OF IDAHO,	)	Case No. CRMD 2012-14306
	)	
Plaintiff,	)	APPELLANT'S REPLY MEMORANDUM
	)	
vs.	)	
	)	
TOMLINSON, Wade	)	
	)	
Defendant	)	

INTRODUCTION

The appellant addressed two main issues in this appeal: 1- Denial of due process by the Court's action of allowing the hearing regarding the motion in limine and the filing of the formal complaint on the morning of jury trial; 2- Denial of due process by the Court's erroneous rulings on matters of law and evidence. Either of these two matters standing alone is sufficient to grant the relief requested, the cumulative effect of the two issues mandates that the withheld judgment be vacated and the case remanded for a new trial.

**ORIGINAL**

ARGUMENT

The respondent/prosecutor/State of Idaho, (hereafter "state"), in its STATEMENT OF THE CASE argues a detailed record concerning the filing of various documents,

*[Handwritten signature]*



details continuances, hearings, et al, but the state ignores the main issue-knowledge of the state's intention, (attempting to proceed on a per se basis for proof of the DUI), and notice accompanied by actual rulings from the Court. The "alternative complaint"<sup>1</sup> the state mentions was disclosed, but this matter was not noticed for hearing until the morning of trial. The state is confusing "awareness" with the notice required for due process. The defendant was arguably aware the state intended to proceed per se, but the Court had not ruled that they would be permitted to so do. The state argues at page 2 in their brief that the Court told the state and the defendant that said Court would hear argument on the Motion in Limine the morning of trial. This is not established in the record, the Court made statements about a conversation in chambers, the nature of that conversation is disputed by the defendant, and was disputed on the record, (Tr p 12, ll 1-5). The Court stated the morning of jury trial, "Yeah. I – that was – what I stated. I – I typically would not take that up beforehand, so.", (Tr p 11, ll 23-25). This equivocal statement in no way establishes the defendant had the requisite notice concerning the state's intention to proceed per se. The state lists the numerous hearing dates in their brief; the matter of per se could have been noticed for hearing on any of these dates. The state did not ever provide proper notice. The Court's practice of not having time to hear this type of motion also violates due process. Once again, this was a state motion and it was not properly noticed for hearing. Notice encompasses specific rulings from the Court on the record, the defendant should not have to guess or speculate how the state intends to proceed. A defense expert witness retained to testify at jury trial costs a

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<sup>1</sup> The actual complaint was not filed until the morning of trial. It does not appear from the record that the defendant was ever arraigned on the alternate complaint, which is also a violation of due process.

minimum of \$1,200 up to \$5,000. The defendant was prejudiced by not having an expert to testify concerning ascending BAC, unreliability of field sobriety tests, unreliability and margin of error on the Lifeloc fc 20, et al. Due to the fact the Court had not ruled that the state would be able to proceed per se, the defendant had not scheduled and paid for an expert witness. The defendant requested a continuance, which was denied.

The state argues that preparing a complaint listing per se DUI was sufficient and complied with the terms of the Trial Status Memo. The triggering mechanism for the judicial process is the *filing*, of a document, not the *preparation*. If the complaint had been filed, the defendant would have had the opportunity to object and request to be heard. The state argues the “presumable purpose of such deadline is to give Tomlinson notice of the charging document in advance of trial”, (St’s Brf, p 7). The purpose of a complaint is to place a defendant on notice to trigger due process so rulings can be obtained from the Court.

The state argues that the formal complaint was not an amendment, (St’s Brf, p 7). The only charging document placing the defendant on notice of the charges he was contesting was the citation. This citation did not contain language concerning proceeding pro se. The defendant was prejudiced by the filing on the morning of trial.

The defendant was placed on notice of the language of 18-8004 by the citation. The state argues language in the DUI statute places the defendant on notice that the state can prove the violation per se. The defendant is allowed to present evidence to contest the charges as set out in the statute. The state’s motion in limine and the Court’s ruling precluded the defendant for presenting a defense.

The state argues ad nauseam that the defendant had sufficient notice so as to prepare a defense. The due process violation resulted from the defendant being prohibited from presenting a defense through cross examination of the police officer concerning ascending BAC, field sobriety tests, problems with the Lifeloc, et al.

The state argues ICR 47 allows oral motions to be made and heard without the requisite notice. ICR 45(c), contains the language “and notice of hearing thereof, **shall** be served not later than seven (7) days before the time specified for the hearing...”, (emphasis the author’s). “Shall” is mandatory. As stated above, the state had myriad opportunities to notice the motion in limine for hearing. The state did not cite ICR 47 when asking for the unscheduled hearing, the judge did not make findings related to the exceptions in ICR 45 or ICR 47. Most significantly, the defendant made the appropriate objections to the Court even conducting the hearing. The state argues that ICR 45(c) only applies to written motions, “along with the notice of hearing”, (Brf p 9). The state cannot have it both ways, they argue the defendant had ample time as the motion was filed months earlier, and then the state characterizes it as an oral motion exempt from ICR 45 and under ICR 47. Once again, the judge must make specific findings under ICR 45 and ICR 47.

The state argues the Court could have “similarly reached the merits of the motion based solely on the briefing”, (Br, p 10). This fallacious argument goes to the heart of this issue- this was a contested motion where the defendant is entitled to timely notice and the ability to respond.

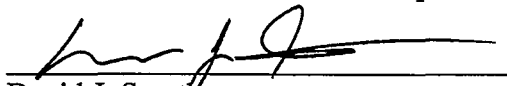
The state argues any error in denying the continuance is harmless, (Br p 12). As stated above, the defendant was denied the opportunity to put on a meaningful and

thorough defense through cross examination of the state's witnesses, and to utilize an expert witness to counter the state's case.

The state argues that the prosecution does not have to prove back extrapolation for a breathe result to be admissible, (Br p 14), and cites language about the defendant being able to introduce evidence of a rising BAC, and said evidence goes to the weight and not the admissibility. The defendant attempted to introduce evidence pursuant to *Sutliff, Robinett*, and *State v Juarez*, 40135 (IDCCR, 11-12-13), and was precluded by the Court's ruling on the state's motion in limine.

#### CONCLUSION

The state cannot limit a defendant's ability to put on a defense by the way they charge a crime. The state cannot utilize the holdings in a civil BAC case to deny a defendant in a criminal case due process of law.

  
David J. Smethers  
Attorney at Law

1-6-14  
Date


CERTIFICATE OF SERVICE: This certifies that a true and correct copy of the above and forgoing instrument was: ☐ Mailed; ☒ Faxed; ☐ Hand Delivered, to:

☐ Ada County Prosecutor;

☐ Boise County Prosecutor;

☒ Boise City Prosecutor;

\_\_\_\_\_  
Dated this 6 day of Jan, 2013

  
David J. Smethers

Time	Speaker	Note
<u>1:05:27 PM</u>		<b>CR-MD-12-14306 State vs. Tomlinson Oral Argument</b>
<u>1:06:05 PM</u>		Mr. Smethers present for the defendant; Ms. Bauges present for the State
<u>1:06:55 PM</u>	Judge	What would an expert demonstrate regarding the Lifeloc testing?
<u>1:08:25 PM</u>	Mr. Smethers	There is an error rate and the company acknowledges that, the expert could explain that to the jury. Should have been able to go into that more with the officer that did testify. I have used an expert in DUI cases before.
<u>1:09:08 PM</u>	Judge	Lets assume that the state had filed the amended complaint in advance of the trial.
<u>1:10:40 PM</u>	Mr. Smethers	We do not agree with the statute. In the main case the state cited the court goes into the prosecution there; reads. I think we beat it to death in the brief, we were not able to lay the proper foundation. Distinction between notice and notify. It would have been a half hour hearing. We did not line up an expert but we would have.
<u>1:11:02 PM</u>	Judge	The transcript I reviewed, you went into excellent cross examination. Page 107, Reads.
<u>1:15:16 PM</u>	Mr. Smethers	The expert would have been able to expand on that. There is an error level in the Lifeloc itself.
<u>1:16:06 PM</u>	Judge	Page 107 Lines 4-7?
<u>1:16:15 PM</u>	Mr. Smethers	Line 4.
<u>1:16:22 PM</u>	Judge	Reading further the officer did concede.....I understand
<u>1:16:35 PM</u>	Mr. Smethers	Lines 21 and 22, the 5% error rate. An expert could testify that it was an error.
<u>1:17:20 PM</u>	Judge	Have you obtained an expert at this point?
<u>1:17:31 PM</u>	Mr. Smethers	I know from prior experience but not in this case. The state cites State vs. Banks.
<u>1:19:04 PM</u>	Judge	Cites 18-8004 for DUI. What if they just came in and put on this evidence. This is the test result, this is the outcome, the machine was proper.
<u>1:20:05 PM</u>	Mr. Smethers	The court ordered a more specific charge. The state was supposed to file a complaint a week before trial. The age of the victim was the issue in Banks. Here it was being prosecuted by the document.
<u>1:20:17 PM</u>	Judge	You read case law that the defense can broaden the process to cover every aspect of the stop from the moment of the stop until the defendant is cited. Is that your reading of the law?
<u>1:22:49 PM</u>	Mr. Smethers	Yes, evidence 402.
<u>1:23:49 PM</u>	Judge	You are fine, I have entrapped you with questions.

<u>1:24:01 PM</u>	Mr. Smethers	There is a whole line of cases that says the defendant cannot be limited in their defense.
<u>1:24:34 PM</u>	Judge	Let's go to the state, lets hear about if everything is fair game.
<u>1:24:49 PM</u>	Ms. Bauges	The state disagrees. I think the Idaho Supreme Court has stated that. Irrelevant evidence is not to be admitted. The legislature's statutory interpretation, the supreme court looked at that and said it was these things. Measure of uncertainties is irrelevant. Clear that rising BAC also falls under that. page 106-108 and the margin of error. I will rely on my brief.
<u>1:27:40 PM</u>	Judge	What about the argument of "if we had known this was to be filed we would have brought in an expert"
<u>1:28:06 PM</u>	Ms. Bauges	First, the notice requirement we are talking about, there was never an order in writing, it was just a pre-trial memo. It was said the complaint was to be prepared no later than one week before trial. The state prepared it and disclosed 3 months prior to trial. it is a non issue because the defendant was aware months before trial.
<u>1:29:45 PM</u>	Ms. Bauges	They wanted to bring an expert in, the problem with that is it is not relevant. There is no substantial prejudice and abuse of discretion. If the expert cannot testify to any relevant evidence then he would not be necessary. There needs to be a specific proof and there is nothing saying an expert can come in and say I can take these numbers to make this number. I want to flush out that there was 3 months of intent to proceed Per Se, it says and/or. The citation said DUI and cited the code section. Notice of 3 months of the Per Se, there was 6 months notice of the two theories. Idaho criminal rule 45c binds the parties not the court.
<u>1:35:46 PM</u>	Ms. Bauges	The SFT, the state brought it up morning of trial, trying to get a ruling on rule of evidence. It was well established law and the state was making sure we were all on the same page. The BAC print out is straight forward. The defendant was on notice of the Per Se. It was a strategic decision not a lack of notice.
<u>1:39:27 PM</u>	Judge	Mr. Smethers lets go to the question, you knew the state might come as a Per Se.
<u>1:39:48 PM</u>	Mr. Smethers	The state's intentions are not what counts. It had not been brought in front of the court. We could have presented the evidence through their witnesses but we were precluded?
<u>1:40:53 PM</u>	Judge	What evidence
<u>1:40:55 PM</u>	Mr. Smethers	Ascending and Descending BAC
<u>1:41:12 PM</u>	Judge	The error factor is what you would have hired an expert for?

<u>1:41:23 PM</u>	Mr. Smethers	That is one aspect. Was it tactical or due process
<u>1:41:50 PM</u>		To prepare an expert would have been \$1200, we didn't have a ruling they could proceed Per Se. We were limited on cross and the ability to present evidence because the state proceeded Per Se
<u>1:42:22 PM</u>	Judge	If you were going to challenge the Lifeloc and the error factor then you would have had an expert
<u>1:43:18 PM</u>	Mr. Smethers	We would have if the court would have ruled they could proceed Per Se. We asked for a continuance and that was not granted, that was an abuse of discretion. The defendant could have put on a fair defense. Impairment is relevant because the jury can use that to decide if the Lifeloc was correct or not. You can drive with alcohol in your system if it is under .08 or does not affect your driving. The defendant was not arraigned
<u>1:45:01 PM</u>	Judge	You waived the reading, its in the transcript
<u>1:45:11 PM</u>	Mr. Smethers	I missed that. Due process violation.
<u>1:45:31 PM</u>	Judge	Thanks all parties. I will take this under advisement and issue a written decision.
<u>1:45:38 PM</u>		END OF CASE

JAN 21 2014

CHRISTOPHER D. RICH, Clerk  
By BRADY ABBOTT  
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,

Plaintiff-Respondent,

vs.

WADE ALLEN TOMLINSON,

Defendant-Appellant.

Case No. CR-MD-2012-14306

MEMORANDUM DECISION  
AND ORDER

ATTORNEY FOR THE APPELLANT: DAVID SMETHERS

ATTORNEY FOR THE RESPONDENT: BRENDA M. BAUGES

This case is before the Court on the defendant's (Mr. Tomlinson's) appeal from the rulings of Magistrate Judge John J. Hawley, Jr., related to his trial for driving under the influence. For the reasons that follow, Judge Hawley's rulings will be affirmed.

**PROCEDURAL HISTORY**

The following procedural statement is taken from the state's brief (internal citations omitted) and appears to essentially be undisputed:

Tomlinson was charged with driving under the influence in the underlying case. At a pre-trial conference held on November 19, 2012, the case was set for jury trial to be held on December 13, 2012. On December 7, 2012, the State disclosed its sworn statement to Tomlinson, indicating that it would file that complaint the day of trial. Upon Tomlinson's request, on the day of trial, the trial was rescheduled due to a scheduling conflict of defense counsel. The trial was rescheduled for February 12, 2013. Thereafter, Tomlinson requested and received a second continuance on January 11, 2013, setting the trial out to March 26, 2013. On January 18,



2013, the State disclosed an alternative sworn complaint to Tomlinson, which contained language alleging only a per se violation of the DUI statute,<sup>1</sup> again indicating that it would file this complaint the day of trial. The State subsequently filed a Motion in Limine on March 4, 2013, three weeks prior to the March trial date, asking the trial court to exclude certain evidence that would be irrelevant for a per se DUI prosecution.

The day before the March trial date, Tomlinson asked for a third continuance of the jury trial. The continuance was based on Tomlinson being unprepared for trial, despite the three month extension previously granted to Tomlinson. The court granted Tomlinson's on the day of trial, indicating, however, that it was going to entertain a motion for witness costs by the State and would likely award those costs. The court also told the State's prosecutor and defense counsel that it would hear argument on the State's motion in limine on the morning of the new jury trial day. The court thereafter awarded the State costs based on Tomlinson's last request for continuance.

The jury trial was eventually held on April 17, 2013. At this point the original complaint had been disclosed to Tomlinson for a little over four months and the alternative complaint, alleging solely a per se DUI violation, had been disclosed to Tomlinson for one day shy of three months. As the State indicated in those disclosures, it filed its chosen complaint the morning of the jury trial in conformance with the trial status memorandum—which required the complaint to be prepared one week prior to the trial, not filed one week prior.

The parties argued the State's written motion in limine, but the court stated that it would not rule prior to trial on the evidentiary issues raised. At that point, the State sought a ruling clarifying the inadmissibility of impairment evidence in a per se DUI prosecution, pursuant to existing case-law. The State provided courtesy copies of a case on point to both the trial court and Tomlinson. The court again deferred making a ruling until the evidentiary issues arose, if at all, during trial. During the trial, these evidentiary issues arose and the trial court excluded impairment evidence and rising blood alcohol content (BAC) evidence. The jury found Tomlinson guilty of DUI.

Tomlinson was sentenced on May 13, 2013, at which time the trial court entered a withheld judgment. Tomlinson now appeals from the entry of the

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<sup>1</sup>"Idaho Code § 18-8004(1)(a) makes it a criminal offense for a person to drive while under the influence of alcohol. That offense may be established under either of two alternative theories of proof: (1) by direct or circumstantial evidence of impairment of ability to drive to the influence of the driver's blood, breath or urine showing an alcohol content in excess of the statutory limit . . . The state, in its complaint, may elect to proceed against the defendant under either or both theories of proof. *Evidence under one theory is not necessarily relevant under the other.*" *State v. Edmonson*, 125 Idaho 132, 134, 867 P.2d 1006, 1008 (1994) (emphasis added).

withheld judgment, alleging numerous errors during the course of the jury trial. Respondent's Brief, at 1-3.

### **STANDARD OF REVIEW**

When a district judge considers an appeal from a magistrate judge (not involving a trial de novo), the district judge is acting as an appellate court, not as a trial court. *State v. Kenner*, 121 Idaho 594, 596, 826 P.2d 1306, 1308 (1992). The interpretation of law or statute is a question of law over which the Court has free review. *State v. Miller*, 134 Idaho 458, 462, 4 P.3d 570, 574 (Ct. App. 2000).

### **ANALYSIS**

In this appeal Mr. Tomlinson asserts the following issues: (1) "should Tomlinson's request for a continuance been granted at the time the state filed the formal complaint on the morning of the jury trial?" and (2) "was Tomlinson denied due process of law by the court's erroneous rulings in matters of law and evidence?" Memorandum in Support of Appeal, at 2.

#### **1. Continuance Denial**

Mr. Tomlinson's first contention is that his "request for a continuance should have been granted at the time the state filed the formal complaint on the morning of [the] jury trial." *Id.* Mr. Tomlinson argues that he was "prejudiced by the amendment [the filing of the complaint] the morning of trial. Tomlinson prepared for trial based on the citation issued the night of the incident." *Id.* "Tomlinson prepared for trial and was on notice that the charge was an impairment DUI up to and including the morning of trial. Unless and until the Court granted the Motion in Limine, per se DUI was not an issue. A defendant should not have to guess or speculate when preparing a defense, and when preparing to argue a Motion in Limine." *Id.*, at 5.

"It is well-established that the granting of a motion for a continuance is vested in the sound discretion of the trial court." *State v. Lopez*, 107 Idaho 826, 827, 693 P.2d 472, 473 (Ct. App. 1984). "Generally, it has been held that unless an appellant shows that his substantial rights have been prejudiced by reason of a denial of his motion for continuance, appellate courts can only conclude that there was no abuse of discretion." *State v. Cagle*, 126 Idaho 794, 797, 891 P.2d 1054, 1057 (Ct. App. 1995). See also *State v. Banks*, 113 Idaho 54, 60, 740 P.2d 1039, 1045 (Ct. App. 1987) ("An amendment of substance carries a corresponding obligation to allow the defense adequate time to prepare an 'amended defense.' However, we have concluded that no unfair prejudice has been shown, even without a continuance. Therefore, we hold that the trial court did not err in denying the continuance motion.").

On the day of the trial, the state noted that it was filing a complaint, at that time. See April 17, 2013 Jury Trial Transcript, at 6. Mr. Tomlinson, through counsel, objected, stating that he was "not placed on proper notice of the Complaint." *Id.*, at 10. In response, the state noted "that this Complaint was sent to defense Counsel on January 18, 2013." *Id.*, at 11.

The complaint that was filed on April 17, 2013 provides:

. . . Wade Allen Tomlinson, on or about the 26<sup>th</sup> day of September, 2012 in the city of Boise, county of Ada, and state of Idaho, did commit the crime(s) of: Count I: DRIVING UNDER THE INFLUENCE OF ALCOHOL AND/OR DRUGS, a misdemeanor, which is in violation of Idaho Code § 18-8004(1)(a); as follows, to wit:

#### COUNT I

That the Defendant, Wade Allen Tomlinson, on or about the 26<sup>th</sup> day of September, 2012, in the city of Boise, county of Ada, state of Idaho, did unlawfully drive or be in actual physical control of a motor vehicle upon a highway, street or bridge, or upon public or private property open to the

public, to wit: 2007 Porsche Cayenne, at or about S. 10<sup>th</sup> St./W. Front St., with an alcohol concentration of .08 or more, as shown by an analysis of blood, urine, or breath, which is in violation of Idaho Code § 18-8004(1)(a). Complaint, at 1-2.

The state filed its motion in limine on March 4, 2013. In its motion, “[t]he State moves in limine to exclude any evidence or testimony, whether elicited by a defense or State witness, regarding the measurement of uncertainty or margin of error for the LifeLoc FC20 device. The State further moves to exclude any evidence or testimony, whether elicited by a defense or State witness, regarding the possibility that the Defendant’s blood alcohol content (BAC) was rising from the time the Defendant was driving to the time the Defendant provided a breath sample.” Motion in Limine, at 1-2.

The motion in limine was filed on March 4, 2013, well before the time it was heard, and Judge Hawley noted that it was his practice to hear motions in limine on the day of trial. April 17, 2013 Jury Trial Transcript, at 9. See *State v. Hester*, 114 Idaho 688, 700, 760 P.2d 27, 39 (1988) (“In short, motions *in limine* seeking advanced rulings on the admissibility of evidence are fraught with problems because they are necessarily based upon an alleged set of facts rather than the actual testimony which the trial court would have before it at trial in order to make its ruling. The trial judge, in the exercise of his discretion, may decide that it is inappropriate to rule in advance on the admissibility of evidence based on a motion *in limine*, but may defer his ruling until the case unfolds and there is a better record upon which to make his decision.”).

Mr. Tomlinson has not refuted the state’s assertion that he was given notice of the contents of the complaint when the state provided him with a copy of the complaint, several months prior to the trial. The complaint also essentially tracks the language of the statute. See I.C. § 18-8004(1)(a) (“It is unlawful for any person who is under the

influence of alcohol, drugs or any other intoxicating substances, or any combination of alcohol, drugs and/or any other intoxicating substances, or who has an alcohol concentration of 0.08, as defined in subsection (4) of this section, or more, as shown by analysis of his blood, urine, or breath, to drive or be in actual physical control of a motor vehicle within this state, whether upon a highway, street or bridge, or upon public or private property open to the public.”).<sup>2</sup>

The Court will find that Mr. Tomlinson has failed to demonstrate that his substantial rights were violated by Judge Hawley’s decision not to grant him a continuance in reference to the filing of the complaint and the state’s motion in limine.

## **II. Erroneous Rulings**

Mr. Tomlinson asserts “[t]he state argued, and Court erroneously ruled that . . . Tomlinson was precluded from presenting any evidence of margin of error on the LifeLoc, ascending descending BAC, results of field sobriety tests, i.e., any evidence of impairment . . .” Memorandum in Support of Appeal, at 5.

“There is no due process violation in excluding irrelevant evidence. There is no constitutional right to drive with alcohol in one’s system . . . After the 1987 amendments, the standard is no longer the concentration of alcohol in the driver’s blood. It is simply the alcohol concentration shown by an approved and properly administered test of the driver’s breath, blood, or urine. Because the actual alcohol concentration in the driver’s blood is no longer the standard, the testing machine’s margin of error is irrelevant.”

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<sup>2</sup>The Court agrees with the state that “three months prior to trial, the State disclosed to Tomlinson [a] . . . complaint, which contained only the per se theory. At this point, Tomlinson was on notice that the State may proceed solely under a per se theory. If there was any doubt, the State subsequently filed a motion in limine, a month and a half prior to trial, asking the court to exclude evidence not relevant in an exclusively per se DUI prosecution. Tomlinson could have had no doubt at that point that the State intended to proceed on a per se basis.” Respondent’s Brief, at 8.

*Elias-Cruz v. Idaho Department of Transportation*, 153 Idaho 200, 205-06, 280 P.3d 703, 708-09 (2012).<sup>3</sup>

“Our Supreme Court has held that when prosecuting under this [the per se] theory, it is not necessary to extrapolate the test results back to the time the defendant was driving. Thus, it is a person’s alcohol concentration *at the time of the test* that is the question when the State proceeds under the per se theory of DUI.” *State v. Juarez*, 155 Idaho 449, \_\_\_ P.3d \_\_\_, 2013 WL 5976768, \*3 (Ct. App.) (emphasis in original).<sup>4</sup>

There was no error concerning the introduction of evidence or lack of introduction of evidence concerning Mr. Tomlinson’s “impairment” because this was a per se DUI prosecution. Consequently, evidence “of margin of error on the LifeLoc, ascending descending BAC, results of field sobriety tests” was simply not relevant here.<sup>5</sup>

The Court will find that the state did not “open the door” to impairment evidence by referencing the officer’s “investigation.” See April 17, 2013 Jury Trial Transcript, at 31 (“Did you conduct an investigation after this.” “I did.”)). As noted by the state, it “never

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<sup>3</sup>The Court agrees with the state that “[t]hrough *Elias-Cruz* is an appeal from an administrative license suspension hearing, the above analysis is entirely based in the criminal DUI statutes and criminal cases.” Respondent’s Brief, at 16.

<sup>4</sup>Mr. Tomlinson argues that he should have been allowed to utilize Officer Frederick as an expert “with the ascending/descending BAC.” Memorandum in Support of Appeal, at 8. “Evidence of impairment is not probative for the purpose of challenging an alcohol concentration test ‘unless an adequate foundation (is) laid to show a correlation between the alleged blood-alcohol level and the likely manifestation of specific symptoms.’ The necessary foundation would ordinarily require expert testimony regarding the reasonably expected symptoms of intoxication of someone with the defendant’s physical characteristics and a breath alcohol content as shown by the Intoximeter. Where, as in *Edmondson*’s case, such foundation is entirely lacking, the evidence of his outward symptoms was not relevant, and therefore inadmissible.” *Edmondson*, 125 Idaho at 135, 867 P.2d at 1009. Mr. Tomlinson’s ascending/descending BAC is not relevant here since, “it is a person’s alcohol concentration *at the time of the test* that is the question when the State proceeds under the per se theory of DUI.” *Juarez*, 2013 WL 5976768 at \*3.

<sup>5</sup>Judge Hawley stated “on a per se theory . . . the law is that . . . the per se violation is at the time that the alcohol test was done . . . that doesn’t prevent the defense from arguing that . . . the test itself . . . the reliability of . . . the LifeLoc . . . the testing that’s done with the LifeLoc, that type of thing is fair game . . .” April 17, 2013 Jury Trial Transcript, at 133-34. Mr. Tomlinson did assert that “the LifeLoc . . . is not accurate.” *Id.*, at 153.

asked Officer Frederick if he gave Tomlinson field sobriety tests; the words 'field sobriety tests' were never used. The State never asked Officer Frederick his impression of Tomlinson's level of impairment or for physical manifestations of impairment." Respondent's Brief, at 21-22.

Finally, Mr. Tomlinson argues that "[t]he Judge erroneously ruled that the [BAC] printout came in." Memorandum in Support of Appeal, at 10. See April 17, 2013 Jury Trial Transcript, at 61. This assertion is also without merit. See I.C. § 18-8004(4) ("Notwithstanding any other provision of law or rule of court, the results of any test for alcohol concentration and records relating to calibration, approval, certification or quality control performed by a laboratory operated or approved by the Idaho state police or by any other method approved by the Idaho state police shall be admissible in any proceeding in this state without the necessity of producing a witness to establish the reliability of the testing procedure for examination."). As noted by the state, this is not an "investigative [report] by police. See I.R.E. 803(8)(A).

Mr. Tomlinson also asserts "[t]he jury should not have had the BAC readout in the jury room." Memorandum in Support of Appeal, at 10. He has cited no authority for this conclusion. The Court is not required to consider issues that are unsupported. See *Bach v. Bagley*, 148 Idaho 784, 790, 229 P.3d 1146, 1152 (2010) ("The argument shall contain the [party's] contentions with respect to the issues presented . . . the reasons therefor, with citations to authorities, statutes and parts of the transcript and the record relied upon."); I.A.R. 35(a)(6); *City of Boise v. Bench Sewer District*, 116 Idaho 25, 26 n.1, 773 P.2d 642, 643 n.1 (1988) (issue not fully briefed or argued is deemed abandoned). The Court also cannot find where he raised this assertion before the

magistrate. See *Ochoa v. Idaho Industrial Special Indemnity Fund*, 118 Idaho 71, 78, 794 P.2d 1127, 1134 (1990) ("As a general rule an appellate court will consider only such points as were raised in the trial court, and this rule precludes a party from asserting, on appeal, claims to relief not asserted or asked for in the court below."). Finally, the jury was authorized to have this exhibit, pursuant to Idaho statutory authority. See I.C. § 19-2203 ("Papers which may be taken by jury.") ("Upon retiring for deliberation, the jury may take with them all exhibits and all papers (except depositions) which have been received in evidence in the cause, or copies of such public records or private documents given in evidence as ought not, in the opinion of the court, to be taken from the person having them in possession. They may also take with them the written instructions given and notes of the testimony or other proceedings on the trial, taken by themselves or any of them, but none taken by any other person.").<sup>6</sup>

### CONCLUSION

In view of the foregoing, Judge Hawley's rulings are hereby affirmed.

IT IS SO ORDERED.

Dated this 21<sup>st</sup> day of January 2014.



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Michael McLaughlin  
Senior District Judge

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<sup>6</sup>Mr. Tomlinson argues, for the first time in his reply brief, that "[i]t does not appear from the record that the defendant was ever arraigned on the alternate complaint, which is also a violation of due process." Appellant's Reply Memorandum, at 2. The court generally does not consider issues which have been asserted for the first time in a reply brief, so this issue will not be reviewed here. See, e.g., *State v. Watkins*, 2008 WL 2220426, \* (Id. Ct. App.) ("A reviewing court ordinarily considers only the issues presented in a party's opening brief on appeal because those are the arguments and authority to which the respondent has an opportunity to reply in the respondent's brief.") (citing *Suitts v. Nix*, 141 Idaho 706, 708, 117 P.3d 120, 122 (2005)).



## CERTIFICATE OF MAILING

I, Christopher D. Rich, the undersigned authority, do hereby certify that I have mailed, by United States Mail, one copy of the MEMORANDUM DECISION AND ORDER as notice pursuant to the Idaho Rules to each of the parties of record in this cause in envelopes addressed as follows:

DAVID J. SMETHERS  
ATTORNEY AT LAW  
1000 S. ROOSEVELT ST.  
BOISE, ID 83705

BOISE CITY ATTORNEY  
VIA INTERDEPARTMENTAL MAIL

HON. JOHN HAWLEY  
MAGISTRATE JUDGE  
VIA INTERDEPARTMENTAL MAIL

CHRISTOPHER D. RICH  
Clerk of the District Court  
Ada County, Idaho

Date:

January 21, 2014

By

Deputy Clerk

Sharon Abbott

189  
DAVID J. SMETHERS  
Attorney at Law  
1000 S. Roosevelt St.  
Boise, Idaho 83705  
208-336-1145  
FAX 208-336-1263

NO. 111 FILED  
AM 11 PM

MAR 03 2014

CHRISTOPHER D. RICH, Clerk  
By AMY LANG  
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT IN AND FOR  
THE COUNTY OF ADA

STATE OF IDAHO,	)	CR-MD-2012-14306
	)	
Plaintiff,	)	NOTICE OF APPEAL
	)	
vs.	)	
	)	
TOMLINSON, Wade	)	
	)	
Defendant	)	

---

1. NOTICE IS HEREBY GIVEN That the above named defendant, Wade Tomlinson, appeals to the Idaho Supreme Court from the MEMORANDUM DECISION AND ORDER entered by the Honorable Michael R. McLaughlin on January 21, 2014, sitting in an the appellate capacity and ruling on the appeal from the withheld judgment entered by the by the Honorable John T. Hawley after the jury's finding of guilt. The defendant has the right to appeal to the Idaho Supreme Court pursuant to Idaho Appellate Rule 11(c)(10). This appeal is taken upon matters of fact and law. The proceedings of the Judgment appealed from are recorded electronically and are in the possession of the Ada County Clerk.
2. The appellant requests preparation of a transcript of the hearing for the Oral Argument on Appeal held on January 16, 2014.
3. Issue presented on appeal including but no limited to:

**ORIGINAL**

-Due process violations consisting of: Denial of the defendant's right to present a defense.

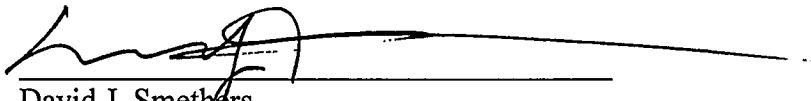
-Denial of the ability to effectively confront and cross examine witnesses.

-Prosecutorial misconduct.

-Erroneous rulings by the Court.

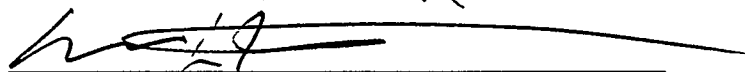
4. I certify: That a copy of this notice of appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out as follows: K. Redlich, Ada County Clerk, 200 W. Front, Boise, Idaho 83702.; That service has been made pursuant to I.A.R. 20 and the Attorney General of Idaho.

DATED THIS 3rd day of March 2014.

  
\_\_\_\_\_  
David J. Smethers  
Attorney for Appellant

CERTIFICATE OF SERVICE: This certifies that a true and correct copy of the above and forgoing instrument was: ☒ Mailed; ☐ Faxed; ☐ Hand Delivered, to:  
☒ Attorney General of Idaho;  
☒ Boise City Prosecutor;

\_\_\_\_\_  
Dated this 3rd day of March, 2014

  
\_\_\_\_\_  
David J. Smethers

DAVID J. SMETHERS  
Attorney at Law  
1000 S. Roosevelt St.  
Boise, Idaho 83705  
208-336-1145  
FAX 208-336-1263

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
AM. \_\_\_\_\_ P.M. *24*

**MAR 20 2014**

CHRISTOPHER D. RICH, Clerk  
By AMY LANG  
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT IN AND FOR  
THE COUNTY OF ADA

STATE OF IDAHO,	)	CR-MD-2012-14306
	)	
Plaintiff,	)	AMENDED NOTICE OF APPEAL
	)	
vs.	)	
	)	
TOMLINSON, Wade	)	
	)	
Defendant	)	

---

1. NOTICE IS HEREBY GIVEN That the above named defendant, Wade Tomlinson, appeals to the Idaho Supreme Court from the MEMORANDUM DECISION AND ORDER entered by the Honorable Michael R. McLaughlin on January 21, 2014, sitting in an appellate capacity and ruling on the appeal from the withheld judgment entered by the by the Honorable John T. Hawley after the jury's finding of guilt. The defendant has the right to appeal to the Idaho Supreme Court pursuant to Idaho Appellate Rule 11(c)(10). This appeal is taken upon matters of fact and law. The proceedings of the Judgment appealed from are recorded electronically and are in the possession of the Ada County Clerk.
2. The appellant requests preparation of a transcript of the hearing for the Oral Argument on Appeal held on January 16, 2014.
3. Issue presented on appeal including but no limited to:

**ORIGINAL**

-Due process violations consisting of: Denial of the defendant's right to present a defense.

-Denial of the ability to effectively confront and cross examine witnesses.

-Prosecutorial misconduct.

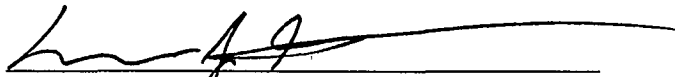
-Erroneous rulings by the Court.

4. A Clerk's Record on appeal is requested.

5. I certify: That a copy of this notice of appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out as follows:

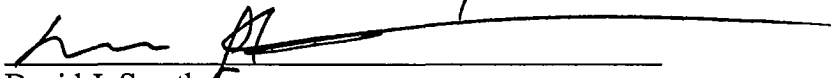
K. Redlich, Ada County Clerk, 200 W. Front, Boise, Idaho 83702.; That service has been made pursuant to I.A.R. 20 and the Attorney General of Idaho.

DATED THIS 3 day of 19, 2014.

  
\_\_\_\_\_  
David J. Smethers  
Attorney for Appellant

CERTIFICATE OF SERVICE: This certifies that a true and correct copy of the above and forgoing instrument was: ☒ Mailed; ☐ Faxed; ☐ Hand Delivered, to:  
☒ Attorney General of Idaho;  
☐ Boise City Prosecutor;  
\_\_\_\_\_.

Dated this 19 day of March, 2014

  
\_\_\_\_\_  
David J. Smethers

12:29

APR 30 2014

CHRISTOPHER D. RICH, Clerk  
By KELLE WEGENER  
DEPUTY

TO: CLERK OF THE COURT IDAHO SUPREME COURT  
451 WEST STATE STREET, BOISE, IDAHO 83702

STATE OF IDAHO,

Plaintiff/Respondent,

VS.

WADE TOMLINSON,

Defendant/Appellant.

Supreme Court  
Docket No. 41913

Case No. CR-MD-2012-14306

NOTICE OF TRANSCRIPT  
LODGING

## NOTICE OF TRANSCRIPT LODGED

Notice is hereby given that on April 28th, 2014, I  
lodged transcript(s) of the following hearing(s):

Hearing, January 16, 2014; of 36 pages for the above-referenced appeal with the District Court Clerk of the County of Ada in the Fourth Judicial District.

Harry R. Redlich

Kasey A. Redlich,  
Certified Court Reporter.

4/28/14

Date

KW

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,

Plaintiff-Respondent,

vs.

WADE ALLEN TOMLINSON,

Defendant-Appellant.

Supreme Court Case No. 41913

CERTIFICATE OF EXHIBITS

I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada, do hereby certify:

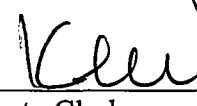
That the attached list of exhibits is a true and accurate copy of the exhibits being forwarded to the Supreme Court on Appeal.

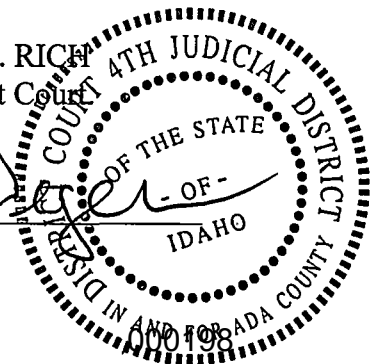
I FURTHER CERTIFY, that the following documents will be submitted as EXHIBITS to the Record:

1. Transcript of Jury Trial held April 17, 2013, Boise, Idaho, lodged September 3, 2013.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 30th day of April, 2014.

CHRISTOPHER D. RICH  
Clerk of the District Court

By   
Deputy Clerk



CERTIFICATE OF EXHIBITS

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE JOHN HAWLEY JR.  
CLERK: D. Finnegan  
CT REPORTER:

April 17, 2013

THE STATE OF IDAHO,

Plaintiff,

vs.

WADE ALLEN TOMLINSON,

Defendant.

Case No. CR-MD-2012-0014306

EXHIBIT LIST

Counsel for State: Boise City Prosecutor- Generic

Counsel for Defendant: David J Smethers

**STATE'S EXHIBITS / EVIDENCE**

**Admitted**

**Date Admit**

(If evidence include property number)

1.	Certificate of approval for alcohol testing machine	Admitted	4/17/13
2.	Log of performance verification checks on lifeloc	Admitted	4/17/13
3.	Certificate of approval for alcohol lot solution	Admitted	4/17/13
4.	Test result printout for breath alcohol test	Admitted	4/17/13

**DEFENDANT'S EXHIBITS**

**Admitted**

**Date Admit**

A.	Google map	Admitted	4/17/13
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EXHIBIT LIST

000199



IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,

Plaintiff-Respondent,

vs.

WADE ALLEN TOMLINSON,

Defendant-Appellant.

Supreme Court Case No. 41913

CERTIFICATE OF SERVICE

I, CHRISTOPHER D. RICH, the undersigned authority, do hereby certify that I have personally served or mailed, by either United States Mail or Interdepartmental Mail, one copy of the following:

CLERK'S RECORD AND REPORTER'S TRANSCRIPT

to each of the Attorneys of Record in this cause as follows:

DAVID J. SMETHERS

ATTORNEY FOR APPELLANT

BOISE, IDAHO

LAWRENCE G. WASDEN

ATTORNEY FOR RESPONDENT

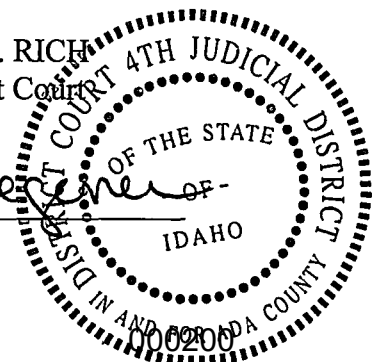
BOISE, IDAHO

Date of Service: APR 30 2014

CERTIFICATE OF SERVICE

CHRISTOPHER D. RICH  
Clerk of the District Court

By K. W. [Signature]  
Deputy Clerk



IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,

Plaintiff-Respondent,

vs.

WADE ALLEN TOMLINSON,

Defendant-Appellant.

Supreme Court Case No. 41913

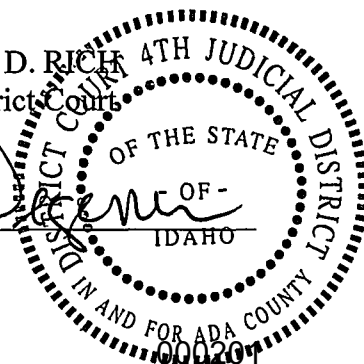
CERTIFICATE TO RECORD

I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the above and foregoing record in the above-entitled cause was compiled under my direction as, and is a true and correct record of the pleadings and documents that are automatically required under Rule 28 of the Idaho Appellate Rules, as well as those requested by Counsel.

I FURTHER CERTIFY, that the Notice of Appeal was filed in the District Court on the 3rd day of March, 2014.

CHRISTOPHER D. RICH  
Clerk of the District Court

By [Signature]  
Deputy Clerk



CERTIFICATE TO RECORD